IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1902

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

CONSOLIDATED EXPRESS, INC. and TWIN EXPRESS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, International Longshoremen's Association, AFL-CIO ("ILA") respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The majority and dissenting opinions of the Court of Appeals, rendered on April 16, 1979 and amended May 18, 1979, are not yet officially reported. They appear at

pages 2a-71a of the Joint Appendix hereto.* The underlying opinion of the United States District Court for the District of New Jersey rendered on December 19, 1977 appears at 72a-120a. A supplementary opinion of the District Court appears at 123a-125a. The District Court's order amending its opinion appears at 126a-127a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 16, 1979. This Petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

Questions Presented

1. (a) Whether a prior NLRB determination may properly be invoked to collaterally estop defendant from contesting liability where the Board's determination involved a change of position which the District Court recognized was premised on an error of law, where additional relevant evidence has been unearthed through discovery which was unavilable in the administrative proceeding, where, by reason of the nature of the administrative determination, new issues have been generated which were not, and could not be, litigated before the agency, and where, if this Court upholds defendants' rights to trial of the same allegations to determine antitrust liability, no economy would result?

(b) Whether the standard for avoiding the imposition of offensive collateral estoppel on the ground that a fair opportunity to litigate was unavailable in a prior NLRB proceeding should be as rigorous as that which is required to re-open a judgment already entered?

* These and the following referenced opinions being voluminous are printed in a separate bound Joint Appendix to the Petitions of ILA and the New York Shipping Association, Inc. ("NYSA"), concurrently filed with the Court. It is submitted simultaneously herewith, and is referenced herein: "——a".

2. (a) Whether a defendant's due process rights to notice, presentation of its evidence and trial were denied by a circuit court decision ordering summary judgment dismissing an affirmative defense of estoppel *en pais* on the ground that defendant made no evidentiary showing in opposition to the motion, where (1) plaintiffs' motion was addressed only to the legal sufficiency of the defenses, (2) where plaintiff presented no affidavit or other evidentiary material in support of its motion, (3) where the district court found that the defense was legally sufficient, and (4) where the circuit court failed to provide any procedure, such as remand, in which defendant would have an opportunity to present its evidence in support of the defenses?

(b) Whether the above circumstances, even if they do not constitute denial of due process, nevertheless violate Rule 56 of the Federal Rules of Civil Procedure by granting summary judgment on a factual point without an evidentiary showing by the movant?

3. Whether LMRA § 303, which this Court has held Congress intended to be purely compensatory, is to be treated in practical effect no differently from punitive statutes for purposes of determining the applicable statute of limitations, the availability of affirmative defenses, and the imposition of offensive collateral estoppel?

4. Whether illegality may be raised as an affirmative defense to an action under LMRA § 303, (a) where the cause of action is purely compensatory and plaintiffs' lack of required licenses which would preclude them from lawfully collecting from their own customers what they seek as damages from defendant; and (b) where the secondary boycott violation has been held by the NLRB to be unlawful only when applied to a limited class of persons, into which these plaintiffs, by reason of the illegality of their businesses, rightfuly do not fall?

5. (a) Whether Congressional silence on the statute of limitations to be applied to a private action under LMRA § 303 for damages resulting from a secondary boycott should be interpreted as intending the action to have: (i) the same six-month limitation as the federal statute in which secondary boycotts are outlawed; (ii) the analogous statute of limitations of the state in which the private action is filed; or (iii) a different judge-made limitation?

(b) Whether the answer to the above question depends upon the particular kinds of acts alleged to have constituted the unfair labor practice?

(c) Whether a six-year limitation on such action frustrates federal policies encouraging collective bargaining agreements, the stability of existing relationships and speedy resolution of labor disputes?

6. Whether the rule applying state limitations to LMRA § 303, which has no express limitations, may be invoked without reference to state or federal choice of law principles?

Statutory Provisions Involved

The following relevant statutes appear at the indicated pages of the Joint Appendix:

Preliminary Statement

Simultaneously herewith a Petition For A Writ Of Certiorari is being filed by co-defendants with respect to the antitrust issues raised by this case. Petitioner ILA, a defendant in the antitrust counts, concurs and joins in co-defendant's petition for the reasons stated therein. The instant petition will confine itself to the issues arising under the LMRA count.

Statement of the Case

The multi-faceted judgment of which review is sought herein was rendered in an action for damages against Petitioner-Defendant ILA under § 303 of the Labor Management Relations Act, 29 USC § 187 (LMRA), and § 4 of the Clayton Act, 15 USC § 15. Defendant ILA is a labor organization representing longshoremen in the Atlantic and Gulf Coast Ports of the United States. NYSA is an incorporated association authorized to negotiate and enter into collective bargaining agreements on behalf of members who are ILA-employers engaged in the business of shipping cargo. This case arose out of collectively bargained work rules, known as the "Rules on Containers", designed to preserve longshore work at the docks by inhibiting pier-based employers from permitting work on their own equipment to be done by land-based labor of employers in close proximity to the port.

Whereas historically longshoremen had handled all maritime cargo piece by piece between the hold of the vessel and the tailgate of the truck, the increasing use of large receptacles, known as containers, which are affixed to and in aggregate form the hold of specially designed ships[1] and whose modularity permits them to be transported

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[1] This Court has recognized in another context that containers are the "functional equivalent of the hold of the ship" and that their unloading, even ashore, constitutes the unloading of the ship. *Northeast Marine Terminal Company, Inc.* v. *Caputo*, 432 US 249, 270-271 (1977).

inland intact by rail or truck, decimated work opportunities for longshoremen.[2]

To preserve that work from further erosion, the Rules, in pertinent part, were directed towards consolidators within 50 miles of a port whose employees load and unload from containers the cargo which had traditionally been handled by longshoremen at the docks. Plaintiffs, Consolidated Express, Inc. ("Consolidated") and Twin Express, Inc. ("Twin"), are such consolidators in the Port of New York area. Although they were aware of any possible violations of the LMRA as early as 1969, they deliberately elected not to challenge the Rules legally. Instead they permitted them to be enforced against competing consoidators, while they themselves surreptitiously evaded the Rules by fraud, forgery and commercial bribery. When it became apparent that the Rules were not accomplishing their intended purpose of preserving longshore work, the ILA and NYSA, relying on plaintiffs' evident acquiescence in the lawfulness of the Rules,[3] enacted more stringent enforcement provisions in 1973. No longer able to corner the market by evasion, plaintiffs embarked on litigation.

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[2] Statistics in the Port of New York over the period of containerization show that total work hours have declined from almost 43 million man-hours in 1958 to about 17.7 million man-hours at the present time. The number of registered longshoremen has decreased from 31,629 in 1958 to a present level of 10,919, of which only about 7,500 are hired on a daily basis. During the same period the amount of cargo handled by the port has almost doubled.

[3] Plaintiffs' deception was aided by the fact that earlier legal testing of the Rules had found them to be lawful. In 1969 the Newark Regional Director of the NLRB, sustained by the Board's General Counsel, dismissed a charge by Intercontinental Container Transport Corp. (ICTC), identical to the charge brought by plaintiffs herein, that they violated LMRA § 8(b)(4) and § 8(e) on the grounds they were work preservation. Also, their legality had been upheld under the antitrust laws for the same reason by the United States Court of Appeals for the Second Circuit. *Intercontinental Container Transport Corporation* v. *New York Shipping Association, Inc.*, 426 F.2d 884 (2d Cir. 1970).

Related Litigation

Prior to commencing the case at bar, plaintiffs herein brought charges with the National Labor Relations Board against the ILA and NYSA alleging violation of the "secondary boycott" and "hot cargo" provisions of the LMRA, § 8(b)(4) and § 8(e). In August 1973, the Board sought a preliminary injunction pursuant to § 10(l) of the LMRA. 29 USC § 160(l). The United States District Court for the District of New Jersey granted the injunction *Balicer* v. *International Longshoremen's Association, AFL-CIO,* 364 F.Supp. 205 (D.N.J. 1973), and the Third Circuit, *per curiam,* affirmed its limited finding of "reasonable cause", 491 F.2d 748 (3rd Cir. 1973).[4]

The two week notice of the 10(l) proceeding gave respondents therein no practical opportunity to utilize any disclosure procedures available in the district court. Moreover, the limited issue on a 10(l) injunction severely restricted any possible inquiry into the charging parties' activities. Since the rules of the NLRB afford no means of discovery, respondents in that proceeding, realizing that it would be impossible to obtain further evidence in the charging parties' possession, stipulated that the record before the district court should form the record before the Board.

On that record, Administrative Law Judge Arnold Ordman, himself a former General Counsel of the Board, recommended dismissal of the charges, holding that the Rules fell within the doctrine of work preservation enunci-

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[4] The narrow scope of the *Balicer* case is underscored by the subsequent observation of the Court of Appeals in *Sea-Land Service Inc.* v. *Director, Office of Workers Compensation Programs, United States Department of Labor,* 552 F.2d 985, 989, fn. 5 (3rd Cir. 1977), rendered after its affirmance and after a decision by the Second Circuit which went to the merits of the Rules, that it had no view on the validity of the Rules on Containers in the Third Circuit.

ated by this Court in *National Woodwork Manufacturers Association* v. *NLRB*, 386 US 612 (1967).

The Board reversed Judge Ordman. In purportedly applying the criteria of *National Woodwork*, it defined the "precise work in controversy" as that of the *consolidators'* employees and so found the Rules not to be work preservative and an unfair labor practice, *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 NLRB No. 144 (1975).[5] On a proceeding for enforcement and review, a divided panel of the Court of Appeals for the Second Circuit upheld the Board. *International Longshoremen's Association, AFL-CIO* v. *NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. den.* 429 US 1041 (1977).[6] The division was purely on an issue of law. The majority agreed with the Board's definition of the work in controversy as that of the consolidators' employees. Judge Feinberg dissented, arguing that this was a clear misconception of the holding of this Court and that *National Woodwork* required the definition of the work in controversy to be the work sought to be preserved i.e., that of the complaining employees (here ILA longshoremen), the work preceding, not following, the introduction of the new technology.

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[5] Petitioner herein takes the position that the NLRB committed a fundamental error of law in misdefining the work in controversy. If one focuses on the innovator's work, no finding of work preservation is ever possible. Even *National Woodwork* itself would have been decided *contra*. The issue of the Board's error of law is not involved on this petition. However, the fact that the Board introduced a new definition, pursuant to which evidence concerning the charging parties' traditions became of paramount importance, is extremely relevant to the question of whether lack of discovery in the NLRB renders its decision unworthy of being given collateral effect.

[6] The Board proceeding and the subsequent enforcement by the Second Circuit will be referred to as *"Conex I"*.

Proceedings Below

Following the decision in *Conex I*, Consolidated and Twin commenced the present action in the United States District Court for the District of New Jersey. To the LMRA Section 303 Count, petitioner herein asserted the affirmative defenses of the statute of limitations; the illegality of the plaintiffs' entire business operations by reason of their failure to obtain a Part IV Freight Forwarders license as required by the Interstate Commerce Act, 49 USC § 1001 et seq.; and of estoppel *en pais* alleging that defendants had been induced to enact and apply the more stringent enforcement provisions of 1973 (which caused the only damages plaintiffs allege) in reliance on plaintiffs' competitively advantageous scheme of pretending to acquiesce in the Rules while unlawfully evading them in the period 1969-1973.

Evidence of plaintiffs' evasion of the Rules came to light in the initial stages of this case, the first meaningful discovery available to petitioners. It consists partially of Consolidated's own documents painstakingly culled over a period of 3 weeks from its voluminous files (over 100 drawers full) in Puerto Rico.[7] Although there had been intimations of such evidence in the earlier proceedings, lack of adequate discovery procedures had made it impossible to obtain. The evidence goes to the question of whether the work traditions of these consolidator-plaintiffs on which the NLRB relied in *Conex I* ever in fact legitimately existed.

On March 2, 1977 plaintiffs moved for partial summary judgment pursuant to Rule 56(c) FRCP, on (1) the liability of Defendant ILA on the LMRA § 303 count; (2) the liability of all defendants under the antitrust counts; and (3) "the *legal sufficiency* of the affirmative defenses

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[7] Testimony of witnesses in other tribunals, both before and *after* the decisions in *Conex I*, is also available.

raised" (emphasis supplied) by all defendants on all counts. The basis urged for summary judgment on liability was that defendants were collaterally estopped from denying violations of the LMRA by the prior adverse determination in *Conex I*. The moving affidavit was devoted exclusively to a narration of the proceedings before the NLRB and the Second Circuit in support of the invocation of collateral estoppel.

In deciding the motion, the district court held that the defendants were collaterally estopped from denying the LMRA violation (87a-90a) despite the existence of the new evidence and despite the Court's own recognition that under this Court's decision in *National Woodwork,*

> "the NLRB and the Second Circuit were wrong; the jobs of the ILA members *were* threatened by the boycotted product and the union activities were not used as an *Allen Bradley* sword to influence labor relations of a different employer." (106a-107a)

The district court held that, in the absence of a period of limitations in § 303 itself, it would apply New Jersey's six-year statute of limitations without regard to the state's borrowing rules (92a-95a).

However, it denied plaintiffs' motion for summary judgment by sustaining the affirmative defenses of illegality (90a-92a) and estoppel *en pais* (95a-97a). The court held that both defenses were good as a matter of law and that questions of fact existed requiring a fuller development of the record.

The issues on the branch of motion with respect to the affirmative defenses were noticed as purely legal. No affidavit or other evidence was introduced to deny the facts on which the ILA relied. Rather, for purposes of the motion, these facts were conceded as true, and in response defendant made no attempt to establish them by any evidentiary showing but relied on legal argument to show

that the defenses were, indeed, available if they could be proved.[8] The district court so held.

Recognizing that this case involved issues of "monumental" importance (136a), the district court granted certification under 28 USC § 1292(b). The Third Circuit accepted the interlocutory appeal, and eventually all of the issues raised on the motion below were briefed to and decided by the appellate court.

The Third Circuit affirmed the district court's application of collateral estoppel from the prior NLRB decision, suggesting that, if there was new evidence, defendant's appropriate course was to attempt to re-open *Conex I*.[9] (21a).

It reversed the district court's sustaining of the defense of illegality against the LMRA Count on the ground that this would neutralize the deterrent effect of § 303 (27a-28a) and would be "punishment disproportionate to the crime" of failing to obtain an ICC license (28a).

It upheld the dismissal of the defense of statute of limitations, holding that the New Jersey six-year limitation applied and enunciating the novel and unprecedented rule that neither state nor federal choice of law rules apply because the six-year statute was not "unduly short or discriminatory" and did not therefore thwart federal labor policy (22a-26a).

In reversing the district court's sustaining of the defense of estoppel *en pais* (29a-33a), the Third Circuit expressly

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[8] In arguing for the legal sufficiency for the defense, defendant did refer to some evidence. But this had been included in an affidavit opposing the imposition of collateral estoppel on the grounds of inadequate discovery before the Board. Defendant never attempted a full presentation of its evidence in support of the estoppel *en pais* defense.

[9] Petitions to reopen the prior proceeding on the basis of the newly discovered evidence had been presented to both the Second Circuit and the NLRB and had been denied.

declined to pass upon the issue of law of whether this defense is ever recognized in a § 303 action (31a). Instead it held that the record was deficient of facts or evidence to support the defense (29a-32a).

A petition for rehearing not *en banc* was filed, pointing out that the Third Circuit had decided the estoppel *en pais* issue on a basis from which the parties and the district court had prescinded and without defendant having had the opportunity to submit the evidence whose absence the appellate court found determinative. The petition also pointed out that the effect of the decision was to enact a statute of limitations for § 303 equal to the longest period permitted by any state in which a defendant can be served. The petition also sought reargument on the new issues raised by the Court's holding on the statute of limitations. Reargument was denied by order dated May 18, 1979.

By order dated May 24, 1979, the Court of Appeals granted a stay of its mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure until final disposition by the Supreme Court.

Reasons for Granting the Writ

1. This Court should provide guidance to the federal judiciary on various aspects of the burgeoning area of collateral estoppel.

Certiorari should be granted because the case at bar is the next logical step in a series of decisions by this Court covering the area of collateral estoppel and requires answers from this Court to questions raised with respect to four of its prior decisions. The questions are:

What is an "adequate opportunity to litigate" in the prior forum? *United States* v. *Utah Construction and Mining Co.*, 384 US 394, 422 (1966).

What standard shall be used to determine a party's "inability to engage in full scale discovery"? *Parklane*

Hosiery Co. v. *Shore*, —— U.S. ——, 56 L.Ed. 2d 552 (1979).

What is the collateral estoppel effect where an administrative agency changes its position, thus imposing new liability on a party who has on good faith relied on its earlier ruling? *NLRB* v. *Bell Aerospace Company*, 416 US 267, 295 (1974).

Whether collateral estoppel precludes re-examination of a ruling of law by an administrative agency, recognized as erroneous by the subsequent court, which ruling fixes no rights or status in any party? *United States* v. *Moser*, 266 US 236 (1924).

A. Opportunity for "Full Discovery"

Only recently in *Parklane Hosiery Co.* v. *Shore, supra*, this Court recognized the danger inherent in the offensive use of collateral estoppel whereby a plaintiff, by its choice of the initial forum, may gain an unfair advantage in the subsequent litigation (58 L.Ed. 2d at 562). Inability "to engage in full scale discovery" was one of the precise circumstances mentioned which might warrant the denial of collateral estoppel (58 L.Ed. 2d at 562, fn. 15).

The decision below is unprecedented in its limitation on this caveat. It requires a litigant who seeks to avoid offensive collateral estoppel to make a showing of the kind of unfairness which would induce the original tribunal to reopen its already rendered judgment. While such a standard might be appropriate in a *res judicata* situation, it goes far beyond what the decisions of this and other Courts suggest with respect to collateral estoppel. The reopening of a rendered judgment is a rare and extraordinary remedy, granted only in the most compelling circumstances, and the burden imposed upon the party seeking it is one of the highest the law knows. *The Marine Insurance Co. of Alexandria* v. *Hodgson*, 11 US (7 Cranch), 332, 3 L.Ed. 362 (1813); *Hazel-Atlas Glass Company* v.

Hartford-Empire Company, 322 US 238 (1943); *Pickford* v. *Talbot,* 225 US 651 (1912). It goes far beyond showing "inability to engage in full-scale discovery" and requires a showing of something in the nature of perversion of the judicial process.

Since the lower Courts, in reliance upon *Utah* and now *Parklane,* are permitting offensive collateral estoppel with increasing frequency, a decision by this Court is required as to whether the Third Circuit's unusual standard is correct.

B. Adequate Opportunity to Litigate

In approving the application of the doctrine of collateral estoppel, this Court has consistently warned that the doctrine should be invoked only where the party against whom it is applied has had an "adequate opportunity to litigate" the issues in the prior proceeding *United States* v. *Utah Construction and Mining Company,* 384 US 394, 422 (1966); *Parklane Hosiery Co.* v. *Shore,* —— U.S. ——, 56 L.Ed. 2d 552, 562 (1979).

Until the NLRB defined the "work in controversy" to be that of plaintiffs' employees (which was *after* the fact finding process had been completed), the issues with respect to plaintiffs' own unlawful activities were of little relevance, even if evidence of them had been available. The focus in *Conex I* was on the *union's* activities.[10] In the present compensatory action, however, the issue is precisely whether plaintiffs fall within the limited class (consolidators with an existing work tradition) against whom enforcement of the Rules the Board found to be

[10] An unfair labor charge can be brought by any person, whether or not he has been affected or aggrieved by the alleged practice. *NLRB* v. *Local 42 Internat'l Ass'n of Heat and Frost Insulators and Asbestos Workers, supra; NLRB* v. *Chauffeurs, Teamsters and Helpers, Local No. 364 Int'l Bro. of Teamsters, C.W. & H. of America,* 274 F.2d 19, 24-25 (7th Cir. 1960).

an unfair labor practice,[11] i.e., whether they are a person "injured in his property or business."

Thus, petitioner herein is placed in a classic Catch 22 situation. Before the fact of the Board's decision, there was no reason to litigate the issue of plaintiffs' status. After the fact of the Board's decision, petitioner is collaterally estopped from litigating it.

Since this Court has sanctioned the imposition of collateral estoppel by administrative decisions, it should now give guidance to the lower court so as to avoid situations where the rights of litigants are crushed beneath the mechanistic and inexorable application of abstractions.

C. Procedural Due Process

The cumulative effect of the Third Circuit's blanket imposition of collateral estoppel while striking all affirmative defenses is to deny defendant its day in court. That alone calls for intervention by this Court. But additional aspects also deserve consideration.

The Board's new definition of the work in controversy represented a significant departure from the position it had taken previously in *National Woodwork.* Its finding that the Rules on Containers violate the LMRA reversed its earlier determination in the *ICTC* situation (*supra,* p. 6 fn. 3) that they are work preservation—a ruling on which defendants herein partially relied in strengthening and enforcing the Rules against plaintiffs. This Court has recognized that the NLRB is entitled to take a new position, but it has left open the question of what the effect of such a

[11] Recently, the Board's Region 5 Director dismissed a charge that these same Rules violated LMRA § 8(b)(4). The grounds were that "in the past employees of [the charging party] have never been, prior to the date of the incident, engaged in the task of partial container off-loading." The dismissal letter is reproduced as an appendix to this petition.

change would be in

> "a case in which new liability is sought to be imposed on individuals for past action, which were taken in good faith reliance on Board announcement." *NLRB* v. *Bell Aerospace Company,* 416 US 267, 295 (1974).

The instant case squarely presents that issue heretofore unresolved by this Court. Moreover, it does so in a context where the district court has recognized that the Board's new position involves an error of law and yet has still applied collateral estoppel in disregard of another decision of this Court. *United States* v. *Moser,* 266 US 236 (1924).

Since the complex collateral estoppel issues in this case bring to fruition potential dangers recognized in earlier decisions of this Court, particularly with regard to administrative decisions which lack some judicial safeguards, review is warranted to guide the lower Courts in similar and ever-recurring circumstances.

2. This Court should grant certiorari to afford defendant due process of law, which was denied by the Court of Appeals by its departure from the Federal Rules of Civil Procedure in granting summary judgment on a factual issue in the absence of evidentiary proof.

The Third Circuit's summary dismissal of the equitable defense represents at the least such a departure from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's supervisory power over the federal judiciary. It is also such a basic denial of due process as to require correction by this Court.

Defendant was never given notice, by either the motion or the moving affidavit, that the facts underlying its affirmative defenses were in contention. Although the motion to dismiss the defense of estoppel *en pais* was postured, argued, decided in the district court and briefed on appeal as an issue of *law,* the Third Circuit granted summary dismissal by deciding that defendant had not produced *facts* to establish the elements of the defense.

In so deciding the Court of Appeals denied defendant due process of law by effectively precluding it from presenting what evidence it might have on the factual issue. This had never been submitted to the district court since, on the motion to dismiss for legal insufficiency, plaintiffs conceded the facts. It had not been considered by the NLRB, both because of its unavailability and because, until the Board re-defined the work in controversy, it was not relevant. Thus, judgment is to be entered without any tribunal even considering defendant's evidence in support of the equitable defense. A more complete denial of due process is hard to imagine.

The ruling of the Third Circuit is in violation of the express language of Rule 56(e) and contravenes the holding of this Court that, where a movant has failed to submit evidentiary matter in support of his motion so as to establish the absence of issues of fact, summary judgment must be denied, notwithstanding that the adverse party does not offer any opposing evidentiary matter. *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 159-60 (1970).[12] It

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[12] That the decision below represents a significant departure from accepted judicial procedure is evidenced by the fact that the rule has been followed and enjoined on the district courts by every circuit, including the Third. *Ramsay* v. *Cooper,* 553 F.2d 237 (1st Cir. 1977); *United States* v. *Bosurgi,* 530 F.2d 1105 (2d Cir. 1976); *United States* v. *Pent-R-Books, Inc.,* 538 F.2d 519 (2d Cir. 1976), *cert. den.* 430 US 906 (1977); *Season-All Industries Inc.* v. *Turkiye Sise Ve Cam Fabrikalari, A.S.,* 425 F.2d 34 (3rd Cir. 1970); *Tomalewski* v. *State Farm Life Insurance Company,* 494 F.2d 882 (3rd Cir. 1974); *Phoenix Savings And Loan, Inc.* v. *The Aetna Casualty And Surety Company,* 381 F.2d 245 (4th Cir. 1967); *Boazman* v. *Economics Laboratory Inc.,* 537 F.2d 210 (5th Cir. 1976); *Board of Education* v. *Department of Health, Education and Welfare, Region 5,* 532 F.2d 1070 (6th Cir. 1976); *Staren* v. *American National Bank and Trust Company of Chicago,* 529 F.2d 1257 (7th Cir. 1976); *Hughes* v. *American Jawa Ltd.,* 529 F.2d 21 (8th Cir. 1976); *Hamilton* v. *Keystone Tankship Corporation,* 539 F.2d 684 (9th Cir. 1976); *Stevens* v. *Barnard,* 512 F.2d 876 (10th Cir. 1975); *Gray* v. *Greyhound Lines East,* 554 F.2d 169 (D.C. Cir. 1976).

likewise violates the well-established rule that on a motion for summary judgment the facts must be viewed in the light most favorable to the opposing party. *United States* v. *Diebold, Inc.*, 369 US 654, 655 (1962).

This Court is the arbiter and supervisor of the Federal Rules of Civil Procedure. See 28 USC § 2071; *Schlagenhauf* v. *Holder*, 379 US 104 (1964); *Los Angeles Brush Manufacturing Corporation* v. *James*, 272 US 701 (1927). In that role it should grant certiorari to require the Third Circuit to comply with Rule 56 and the decision in *Adickes, supra.* In the past, this Court has performed its supervisory function on a continuing basis. Having articulated the fundamental rule at least as long ago as 1943, *Sartor* v. *Arkansas National Gas Corporation*, 321 US 620 (1944), it has not hesitated to grant certiorari and, reiterating the same point of law, to correct its abuse when it has been violated. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 US 464 (1962); *Adickes* v. *S.H. Kress & Company, supra* (1970). The instant case calls for a similar exercise of supervision.

3. Review is required to correct rulings of the Court of Appeals which misconstrue a federal statute with national implications.

In its holdings on the statute of limitations, the illegality defense and collateral estoppel, the Third Circuit has misconstrued the nature and purpose of LMRA § 303. This Court has held that § 303 is purely compensatory, to make whole persons injured in their property or business by an unfair labor practice as defined in other sections of the Act. *Local 20, Teamsters, Chauffeurs and Helpers Union* v. *Morton*, 370 US 252, 260 (1964); see also *Sheet Metal Workers International Association, Local 223* v. *Atlas Sheet Metal Co. of Jacksonville*, 384 F.2d 101 (5th Cir. 1967). See also, *International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corporation*, 342 US 237, 244 (1952).

While ostensibly recognizing the purely compensatory nature of § 303, the Third Circuit treated it for all intents and purposes, as punitive. Indeed, the Court accorded § 303 no different treatment than that given the antitrust statute. Thus, it denied the availability of the illegality defense to both counts, but under a rationale applicable only to punitive and deterrent actions and not to compensatory actions.[13] By focusing on "deterrence" and upon "punishment disproportionate to the crime", the Third Circuit failed to deal with the real relevance of the illegality defense, i.e. that, because they are unlicensed, plaintiffs do not fall within the class of persons against whom the NLRB found applications of the Rules to be an unfair labor practice, and, hence, plaintiffs cannot be injured parties for purposes of § 303.

The Court of Appeals applied the New Jersey statute of limitations without borrowing, notwithstanding that the interest protected by § 303 is the integrity of plaintiffs' business which existed only in Puerto Rico and certainly had no connection with New Jersey. And it required collateral estoppel on a point of pure law in the NLRB decision in *Conex I* which fixed no rights in plaintiffs, in disregard of this Court's holding that collateral estoppel does not apply on a point of law which did not adjudge a party's rights or status in the prior action. *United States* v. *Moser*, 266 U.S. 236 (1924). As demonstrated above, the blanket imposition of collateral estoppel effectively prevented litigation of a decisive issue under § 303, i.e., plaintiffs' status

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[13] Unlike the antitrust law, which protects both private and public interests in a single action for compensatory and punitive damages, the LMRA distinguishes the two. Vindication of the public interest against unfair labor practices is provided for by an NLRB proceeding pursuant to § 10, 29 USC 160, where a charge may be brought, not only by an injured party, but by "any person" NLRB Rules and Regulations § 102.9; *NLRB* v. *Local No. 42, Internat'l Ass'n of Heat and Frost Insulators and Asbestos Wkrs.*, 469 F.2d 163, 165 (3rd Cir. 1972), *cert. den.* 412 US 940 (1973).

as injured parties, which had not been litigated before the NLRB.

Instruction by this Court is necessary as to the implications of the *Morton* decision for issues like those presented in this case and to prevent erosion of that decision and the Congressional policy it articulates by the practice of mere lip service.

4. A ruling by this Court is necessary to clarify whether a state statute of limitations may be applied to a federal cause of action without reference state or federal choice of law principles.

In its ruling that no conflict of laws principle applies, the Third Circuit struck new ground—ground on which a plaintiff may stand to invoke the longest statute of any state where a defendant may be served. Its decision failed to follow a prior holding of this Court, conflicts with the holdings of two sister circuits, and disregards a federal statute. At the same time, it addresses a question expressly left open by an earlier decision of this Court. All these factors call for review.

The Third Circuit rule is one of first impression. No case has been found, nor was any relied upon by the court, to support the avoidance of choice of law in applying a state statute of limitations to a federal cause of action. This Court has held, in *Cope* v. *Anderson,* 331 US 461 (1947), that choice of law principles *do* apply to state limitations when they are relied upon to measure the timeliness of a federal cause of action. The Third Circuit distinguished *Cope* on the grounds that "the explanation for this holding is obscure", that it dealt with 12 USC §§ 63, 64 (National Banking Act) rather than § 303, and that it applied to a statutory rather than judge-made choice of law rule (24a, 25a).

The Second and the Eighth Circuits have held that state borrowing rules do apply to state limitations which measure

the timeliness of federal actions. *Arneil* v. *Ramsey,* 550 F.2d 774, 779 (2d Cir. 1977) (*Securities Exchange Act of 1934,* 15 USC 78j (b)); *Burns* v. *Union Pacific Railroad,* 564 F.2d 20, 21-22 (8th Cir. 1977) (*Civil Rights Act,* 42 USC § 1981). Both conflict with the Third Circuit rule.

In both earlier cases the state choice of law rules were statutory rather than judge-made. However, under the *Rules of Decision Act,* 28 USC 1652, a federal court relying on a state law must interpret it in accordance with state decisions. The Third Circuit failed to do so.

In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.)* v. *Hoosier Cardinal Corporation,* 383 U.S. 696 (1966), this Court expressly refrained from deciding "whether such a choice of law should be made in accord with the principle of *Klaxon Co.* v. *Stentor Mfg. Co.,* 313 US 487 . . . or by operation of a different federal conflict of laws rule" 383 US at 705, fn. 8. The instant case presents that issue squarely.

Since the Third Circuit's holding is novel and unprecedented and since it also can be applied to *any* federal statute which does not have its own period of limitations, the statute of limitations issues decided therein should be reviewed by this Court.

5. Whether the statute of limitations for LMRA § 303 is six months or some other period is a national question which should be decided by the Supreme Court.

The decision in this case, in practical effect, enacts a statute of limitations for § 303. It is respectfully urged that a decision of such national significance should be made by the Supreme Court in the light of its interpretation of the Congressional policy embodied in the LMRA.

This Court has never decided what statute of limitations should apply to § 303.[14] This section creates a federal right to compensation for injuries resulting from a secondary boycott proscribed by LMRA § 8(b)(4). The statute of limitations on bringing a secondary boycott charge before the NLRB is six-months LMRA § 10(b), 29 USC § 160(b). Congress did not enact a separate statute of limitations for filing an action for compensation.

This Court has suggested analytic guidelines with respect to actions brought under another unlimited section of the LMRA, § 301, *United Auto Workers* v. *Hoosier Cardinal Corp., supra;* see also *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Lucas Flour Company,* 369 US 395 (1962), including consideration of the impact of the particular cause of action on the collective bargaining process, *United Auto Workers* v. *Hoosier Cardinal Corp.,* 383 US at 705 fn. 7, and its effect upon the rapid disposition of labor disputes, 383 US at 707. However, the Third Circuit has enunciated a rule so novel as not to have even been proposed by plaintiffs and has done so without consideration of these and other relevant factors which ought to be taken into account before any time period is established.

This case is one of first impression and review by this Court is necessary to establish a uniform statute of limitations for a law of national application.

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[14] Two circuits have addressed the issue of appropriate limitations for § 303 actions, *Falsetti* v. *Local Union No. 2026 United Mine Workers of America,* 355 F.2d 658 (3rd Cir. 1966); *International Union Of Operating Engineers* v. *Fishbach and Moore,* 350 F.2d 936 (9th Cir. 1965). (A case in another Circuit, *United Mine Workers of America* v. *Meadow Creek Coal Company,* 263 F.2d 52 (6th Cir. 1959), *cert. den.* 359 US 1013 (1959), is sometimes cited in this issue but the court had held that there was no federal violation. 263 F.2d at 59. It merely decided which of two state limitations applied to a state cause of action.)

6. The various questions raised by this case are such as will frequently recur in future litigation and thus warrant resolution by this Court at the present time.

The procedural issues herein have a pervasive influence throughout the federal judiciary and may arise in a multitude of contexts. Summary judgment granted without opportunity to be heard is an issue of constitutional due process and on that ground alone deserves consideration by this Court. It is also one fundamental to the procedure of federal courts. The increasing resort to administrative agencies as tribunals of first impression and the burgeoning use of collateral estoppel as an offensive weapon goes to the nexus of the administrative and judicial functions. The boundaries of this doctrine require precise articulation. In its supervisory capacity over the procedure of all federal courts, this Court should grant review.

The substantive issues with respect to the LMRA § 303, both as to its purpose and the appropriate statute of limitations, involve a federal statute in an area of vigorous activity. As the district court itself noted

> ". . . the law that will emerge from this case can have tremendous precedential effect upon the relationships between unions, employers, and third party businessmen throughout the country . . . they are going to be negotiating some future contracts around this country with an eye towards what we have said here."

Determinations of this Court are necessary not only for the conduct of future litigation but for the collective bargaining process itself.[15] For instance, disputes long settled

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[15] The problem of containerization and the Rules has already given rise to three major strikes: in 1968 (57 days in New York, 100 days in other ports, after expiration of a Taft-Hartley injunction), in 1971 (60 days), and in 1977 (41 days, against *containerized* employers only).

between an employer and his employees may be resurrected at the behest of a third party after the settlement has been the basis of two, three or more subsequent contracts if a plaintiff can serve the union in a state with a particularly long statute of limitations. The national implications of this merit consideration in light of both the need "to stabilize existing bargaining relationships", recognized by this Court as a policy of the LMRA. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO* v. *NLRB*, 362 US 411, 419 (1960), and the policy of speedy resolution of labor disputes *UAW* v. *Hoosier Cardinal, supra.*

Given the facts that on a variety of questions the Third Circuit has enunciated novel and unprecedented rulings or has significantly departed from previous holdings and that numerous courts will face the same issues, guidance by this Court is required.

Conclusion

WHEREFORE, for the reasons above stated, Petitioner ILA respectfully submits that a Writ of Certiorari should be granted.

Respectfully submitted,

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ADDENDUM

NATIONAL LABOR RELATIONS BOARD

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April 23, 1979

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Re: International Longshoremen's Association, et al.
(Terminal Corporation)
Cases 5-CC-920 & 5-CD-246

Gentlemen:

The above-captioned case, charging violations under Section 8 of the National Labor Relations Act, as amended, has been carefully considered.

It was concluded that the International Longshoremen's Association did not engage in conduct violative of either Section 8(b)(4)(i)(ii)(B) or 8(b)(4)(D) of the Act by its refusal to release to Sea Wheels, a trucking firm, two containers destined for Richmond, Virginia, when ILA was made aware of the fact that employees of Terminal would off-load portions of said containers. It was noted that Terminal's name did not appear on any of the accompanying documents as in the past and that in the past employees of Terminal have never been, prior to the date of the incident, engaged in the task of partial container off-loading. Ac-

cordingly, further proceedings are not warranted, and I am refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C., 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on May 7, 1979. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with me within the time stated above.

Very truly yours,

WILLIAM C. HUMPHREY
William C. Humphrey
Regional Director

Enclosures
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1902

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,

Respondents.

No. 78-1905

NEW YORK SHIPPING ASSOCIATION, INC., *et al.*,

Petitioners,

v.

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

This supplemental brief is filed, pursuant to Rule 24(5) of the Rules of this Court, to bring to the Court's attention

the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *International Longshoremen's Ass'n* v. *NLRB,* Nos. 77-1735, 77-1758 and 78-1510 (D.C. Cir. September 25, 1979). A copy of the decision is reproduced as an Addendum to this brief.

The opinion of the District of Columbia Circuit is intimately related to the case now before this Court. It involves the identical Rules on Containers, the identical labor controversy and virtually the same operative enforcement of the Rules in the same port against two other consolidators, who, like the respondents in this case, were engaged in the off-pier consolidation of ocean borne cargo in the New York to Puerto Rico trade.

In a 67-page majority opinion, Chief Judge J. Skelly Wright of the District of Columbia Circuit meticulously reviewed (1) the factual background surrounding the formulation and development of the Rules on Containers; (2) the fundamental legal principles embodied in the doctrine of work preservation; and (3) the extended history of litigation involving the legality of the Rules on Containers under federal labor law.[1] He then concluded that the National Labor Relations Board ("NLRB" or "Board") had committed a reversible error of law when it invalidated the Rules on Containers under §§ 8(b)(4) and 8(e) of the Labor Management Relations Act, 1947, as amended ("LMRA"), 29 U.S.C. §§ 158(b)(4) and 158(e). The decisions of the Board in *International Longshoremen's Ass'n (Associated Transport, Inc.),* 231 N.L.R.B. 351 (1977) and in *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.),* 236 N.L.R.B. No. 42, 98 L.R.R.M. 1276 (1978) were reversed and vacated.[2]

[1] *See,* Pet. For Certiorari in No. 78-1905 at p. 8, n. 6 for a brief exposition of the cases that have addressed the labor law aspects of the Rules on Containers, including the then pending District of Columbia Circuit appeal which gave rise to the decision now being presented to this court.

The District of Columbia Circuit's resolution of the issue whether the collectively bargained Rules on Containers are valid work preservation provisions directly and irreconcilably conflicts with the earlier decision of the NLRB that the Rules violate LMRA §§ 8(b)(4) and 8(e) in *International Longshoremen's Ass'n (Consolidated Express, Inc.),* 221 N.L.R.B. 956 (1975), which was enforced by a split decision of the Second Circuit in *International Longshoremen's Ass'n* v. *NLRB,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977).[3]

The earlier adjudications by the Board and Second Circuit constitute the predicate for the Third Circuit's judgment in the instant case. Through the invocation of the doctrine of collateral estoppel, the Third Circuit automatically imposed LMRA § 303 liability. Within this same context, it also formulated a novel, unprecedented and unduly onerous test for the non-statutory labor exemption from the antitrust laws.

Contrary to the Board and the Second Circuit, the District of Columbia Circuit has now determined that the same Rules on Containers are not only lawful under federal law but also

[2] In the same fashion as the present case, these Board decisions have precipitated actions under the antitrust laws and under LMRA § 303, 29 U.S.C. § 187. *See, Houff Transfer, Inc.* v. *International Longshoremen's Ass'n,* No. T-74-1336 (D. Md. Hon. Roszel C. Thomsen) and *Dolphin Forwarding, Inc.* v. *New York Shipping Ass'n,* No. 79-276 (D. N.J. Hon. Herbert J. Stern).

[3] A conflict may also exist with the First Circuit's decision in *International Longshoremen's Ass'n, Local 1575* v. *NLRB,* 560 F.2d 439 (1st Cir. 1977) and with the Fourth Circuit's decision in *Humphrey* v. *International Longshoremen's Ass'n,* 548 F.2d 494 (4th Cir. 1977), *reversing,* 401 F.Supp. 1401 (E.D. Va. 1975).

> represent a reasoned response to the difficult problem of technological innovation and are an exemplar of the self-government contemplated by Congress when it left the bulk of industrial problems to be resolved in the private sector. . . . Courts and the NLRB must take great care not to disturb the parties' reasoned attempts at self-governance unless those attempts contravene the law.

Slip Op. at 52 (Addendum).

Certainly the views expressed by the majority of the District of Columbia Circuit are in irreconcilable conflict with the Third Circuit's judgment that enforcement of the same Rules may well expose the petitioners to treble damages under the antitrust laws. This decision highlights the national importance of the intertwined labor/antitrust issues presented by the Rules on Containers and their enforcement. It is the latest illustration of the sharp judicial discord which has arisen in the circuits. It underscores the need for this Court's review of the exceptionally important issues in this case.

Dated: New York, New York
October 2, 1979

Respectfully submitted,

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ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 77-1758

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

HOUFF TRANSFER, INC., INTERVENOR

No. 78-1510

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND NEW YORK SHIPPING ASSOCIATION, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petitions to Review and Cross-Applications
to Enforce Orders of the
National Labor Relations Board

Argued January 18, 1979

Decided September 25, 1979

Thomas W. Gleason for petitioner International Longshoremen's Association.

Constantine P. Lambos, with whom *Donato Caruso* was on the brief, for petitioner New York Shipping Association, Inc.

Howard E. Perlstein, Attorney, National Labor Relations Board, and *Kathy L. Krieger*, Attorney, National Labor Relations Board, of the bar of the Supreme Court of the State of New York, *pro hac vice*, by special leave of court, with whom *John S. Irving*, General Counsel, *Carl L. Taylor*, Associate General Counsel, *Robert E. Allen*, Acting Associate General Counsel, and *Elliott Moore*, Deputy Associate General Counsel, National Labor Relations Board, were on the brief, for respondent.

William J. Auten, with whom *J. W. Alexander, Jr.* was on the brief, for intervenor Houff Transfer, Inc.

Before WRIGHT, *Chief Judge*, and ROBINSON and ROBB, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* ROBB.

WRIGHT, *Chief Judge*: The National Labor Relations Board (NLRB) decided in these cases—one arising in the Port of New York,[1] the other in the Ports of Baltimore and Hampton Roads[2]—that petitioners Council of North Atlantic Shipping Associations (CONASA), New York Shipping Association (NYSA), and International Longshoremen's Association (ILA) violated the congressional proscription of secondary boycotts.[3] Petitioners challenge the Board's rulings as inconsistent with the Supreme Court's work preservation doctrine, and the Board cross-applies for enforcement of its orders.[4]

[1] No. 78-1510, reviewing *International Longshoremen's Ass'n*, 98 L.R.R.M. 1276 (1978).

The work preservation doctrine provides generally that efforts to preserve work for employees displaced by technological innovation are not unlawful secondary activities and that union-management contracts with the same purpose are not proscribed "hot cargo" agreements. Activities and agreements, however, that seek not to preserve the traditional work of displaced workers but to acquire work of other employees are unlawful under the congressional proscription. The question before us is whether certain rules agreed to by shipping companies and the ILA are an effort by the ILA to acquire work or merely an attempt to preserve its members' traditional responsibilities in the era of containerized shipping.

The NLRB held that petitioners were engaged in work acquisition rather than work preservation. Because we

[2] Nos. 77-1735 and 77-1758, reviewing *International Longshoremen's Ass'n*, 231 N.L.R.B. 351 (1977).

[3] The two cases, though strikingly similar and capable of being treated in a single opinion, have presented the court with independent sets of documents: briefs, joint appendices, etc. Because reference to these documents may cause some confusion, this opinion where necessary will identify the document within the appropriate case by provision of a parenthetical abbreviation of the relevant port or ports. For example, the Joint Appendix (JA) for Nos. 77-1735 and 77-1758, arising in Baltimore and Hampton Roads, will be cited as JA(B-HR); that for No. 78-1510, arising in New York, will be cited as JA(NY).

[4] 29 U.S.C. §§ 160(e), (f) (1976).

believe this judgment rests on erroneous interpretations of the Supreme Court's decisions in *National Woodwork Manufacturers Ass'n v. NLRB* [5] and *NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters*,[6] we grant the petitions for review and set aside the Board's orders. We also deny the Board's cross-applications for enforcement.

I. BACKGROUND

The factual antecedents of the instant disputes revolve around a specific technological innovation—containerization—that has had a momentous impact on the loading and unloading of ocean-borne cargo.[7] Containers are large metal receptacles that can accommodate upwards of 30,000 pounds of cargo and that can be moved to and from a ship as a single unit.[8] Historically, longshoremen transported such cargo piece by piece from the hold of a ship to the pier for inbound cargo and vice versa for outbound cargo.[9] Subsequent to the advent of containerization, however, the role of longshoremen in handling cargo has been greatly reduced. It is now the case that containers can be transported to and from ships without longshoremen handling any of the boxes, crates, and packages enclosed in each container.

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[5] 386 U.S. 612 (1967).

[6] 429 U.S. 507 (1977).

[7] *See* Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 LAB. L. J. 397, 398-400 (1970). The impact of containerization has been felt in ports around the world. *See, e.g.*, Davies, *In Search of Jobs and Defendants*, 36 MOD. L. REV. 78 (1973) (detailing controversies caused by containerization in British ports of Liverpool, Hull, and London).

[8] *See, e.g.*, JA(B-HR) 1056a (specifying allowable weight of one container as 33,000 pounds).

[9] *See* JA (B-HR) 337a-339a, 1087a-1089a (describing traditional work patterns of ILA labor on the docks); Ross, *supra* note 7, at 398-399 (same).

Containerization obviously engendered huge increases in dockside productivity. According to one estimate, the traditional method of handling cargo translated into a productivity factor of 1.4 tons per man-hour; containerization has made it possible for this figure to rise to 30 tons per man-hour.[10] This greater efficiency was only achieved, however, by transforming what was once a labor intensive chore into a largely mechanical one. Hence workers' expectations of job security have come into conflict with management's desire to increase productivity.

Congress has not enacted a statutory scheme whose specific purpose is either to prevent or to resolve disputes between management and labor over how best to accommodate technological innovations in the workplace. As with most other aspects of American industrial relations, the problem of technological innovation has been left to the system of private ordering we know as collective bargaining.[11] A complete understanding of the controversies before us, therefore, requires not only a knowledge of the specific incidents that precipitated the disputes, but also an appreciation for the adjustments to containerized shipping that have been made through the collective bar-

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[10] JA(B-HR) 1090a-1091a (before containerization, "an employer * * * thought he was doing good with 30 ton per gang of 22 men. We can now with the container handling method, with a crane, one crane, and a 20-man gang load as high as 600 tons per hour * * *."); *see* Ross, *supra* note 7, at 400 (one major shipper reports twentyfold increase in productivity).

[11] Other nations have made different choices. *See, e.g.*, Redundancy Payments Act 1965, *recodified in* Employment Protection Consolidation Act 1978 (British legislation that compensates workers who have been made "redundant" due to managerial initiative or technological innovation). For a critique of this Act, *see* Fryer, *The Myths of the Redundancy Payments Act*, 2 INDUS. L. J. 1 (1973).

gaining process in the three port cities involved in these cases.

A. *Containerization in the Ports of Baltimore and Hampton Roads*

CONASA represents constituent shipping associations, including the Hampton Roads Shipping Association (HRSA) and the Steamship Trade Association of Baltimore (STAB), in ports from Massachusetts to Virginia.[12] Since its formation in 1970 CONASA has bargained on behalf of its members with the ILA over certain key issues, including containerization, on a master-contract basis.[13] Prior to the formation of CONASA, North Atlantic ports generally adopted the master terms of the labor agreement for the Port of New York.[14]

Due in large measure to the controversy surrounding containerization, the negotiation in New York of the 1968 collective bargaining agreement was a bitter affair that occasioned a strike of nearly two months' duration by members of the ILA.[15] The implications of this dispute for the national economy were sufficiently far-reaching to involve mediators appointed by the President

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[12] 231 N.L.R.B. at 358.

[13] *Id.* at 360.

[14] JA(B-HR) 1092a-1093a.

[15] JA(NY) 95a (rejected affidavit of John M. Haynes, Executive Vice President of NYSA). The strike lasted over 100 days in other ports on the Atlantic and Gulf coasts. *Id.*

Because the Administrative Law Judge (ALJ) in No. 78-1510 (NY) believed that the case before him was controlled by *International Longshoremen's Ass'n v. NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), he refused to permit the petitioners here to adduce and develop virtually any facts in their defense. *See* ALJ's Order Striking All Affirmative Defenses, JA(NY) 47a-51a; ALJ's Order Rejecting Evidence and Closing Hearing, JA(NY) 52a-53a. Accordingly, proffered affidavits that were rejected by the ALJ, such as the one cited in this footnote, will be noted as such.

of the United States in the dispute's resolution.[16] Part of the agreement that finally emerged in 1968 was a set of rules, known as the Rules on Containers, which represented the compromise reached between management and labor on the containerization issue. The 1968 New York agreement, whose master terms were adopted that year by other ports on the North Atlantic coast, marks the first time that the Rules on Containers were included in the labor contracts in Hampton Roads and Baltimore.[17]

Containerized shipping was first introduced in Baltimore and Hampton Roads in 1965 and 1966,[18] but did not have a substantial impact on work patterns in these ports until the late 1960s and early 1970s, by which time the Rules were adopted. For example, the first crane used to move containers to and from ships was erected in Hampton Roads in 1968 or 1969.[19] And, as a further example, one major shipper, United States Lines, moved

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[16] *See Intercontinental Container Transport Corp. v. New York Shipping Ass'n*, 426 F.2d 884, 888 (2d Cir. 1970) ("In the course of the controversy preceding the execution of the [1968-71 collective bargaining agreement], a Taft-Hartley 80-day injunction was granted and the Board of Inquiry set up in connection with that injunction stated in its report to the President that containerization was the 'most urgent item' of difference between the parties.").

[17] The Rules on Containers as included in the 1968 Hampton Roads agreement are reproduced at JA(B-HR) 529a-531a. The Rules as included in the 1968 Baltimore agreement are reproduced at JA(B-HR) 553a-555a. The Rules as included in the 1968 New York master contract are discussed in respondent's brief (NY) at 6. Any differences among the three versions are, for present purposes, insignificant. The 1968 Rules for Hampton Roads are reprinted in Appendix A to this opinion.

[18] *See* 231 N.L.R.B. at 359; JA(B-HR) 78a, 462a-463a, 1023a, 1091a.

[19] JA(B-HR) 1112a.

only "a handful"[20] of containers through the Port of Baltimore in 1965, about 4,000 containers in 1969, and 25,000 just a few years later in 1973.[21] Thus, although the 1968 Rules on Containers were the parties' collectively bargained response to containerization—and, as such, postdated rather than antedated the advent of containerization—there was in fact no significant time lag between the technological development and the parties' collectively bargained response to it.

To understand the scope of the Rules on Containers, we must first appreciate the different ways in which container loads of cargo are classified. A "consolidated full container load" (CFCL) consists of shipments consolidated into a single container whose cargo belongs to more than one consignee. A "less than trailer load" (LTL) or a "less than container load" (LCL) also refers to a container whose cargo belongs to more than one consignee. A "full shippers' load" (FSL) or "shippers' load," in contrast, is a container of cargo from one shipper to a single beneficial owner consignee.[22] The controversy in Baltimore and Hampton Roads centered on the stripping and stuffing—packing and unpacking—of FSL containers.

It appears that in the Ports of Hampton Roads and Baltimore, in the few years between introduction of containerized shipping and adoption of the Rules on Containers, ILA labor stripped consolidated container loads at the pier.[23] Unless ILA stripping was requested by the

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[20] 231 N.L.R.B. at 354 n.8 (Fanning, Chairman, dissenting).

[21] *Id.* at 362.

[22] 231 N.L.R.B. at 359; JA(B-HR) 68a-69a. This opinion uses the terms "FSL" and "shippers' load" interchangeably, and will often refer to LTL, LCL, and CFCL cargo by the generic term "consolidated container loads." Also, the term "shipper" is used to refer to a shipping company that is a member of a CONASA shipping association.

[23] 231 N.L.R.B. at 359.

consignee's agent or by the stevedore, however, shippers' loads were placed by ILA labor on the pier, where truckmen would then pick up the FSL container intact either to deliver it to the beneficial owner or to store the cargo.[24] The 1968 Rules were to an extent a formalization of these work practices. The Rules provided that ILA labor at the pier was to strip and stuff consolidated container loads that came from or were destined for any person who was not the beneficial owner of the cargo and who was located within 50 miles of the port.[25] The Rules further provided that a shipping company had to pay liquidated damages for each of its containers not handled in accordance with the Rules.[26] And for each container, including FSL containers, that passed over the docks without stripping or stuffing by longshoremen, the shipper was required to pay a royalty into an ILA fund.[27]

The 1968 Rules on Containers expired with the rest of the collective bargaining agreement in 1971, at which time further labor-management conflict over the containerization issue ensued.[28] By this time CONASA was bargaining on behalf of HRSA and STAB. The ultimate compromise reached by CONASA and the ILA on containerization, after another long strike, was to retain the same rules for handling containers and for paying royalties as were embodied in the 1968 agreement, except

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[24] *Id.* at 359-360.

[25] *See* Title I (introductory title to 1968 Rules on Containers entitled "Containerization"), *reprinted in* Appendix A *infra.*

[26] *See* Rule C.5 (liquidated damages clause in 1968 Hampton Roads Rules on Containers providing for damages of $150 per container), *reprinted in* Appendix A *infra.* Liquidated damages were $250 per container both in Baltimore, JA(B-HR) 555a, and in New York, respondent's brief (NY) at 6.

[27] *See* 231 N.L.R.B. at 360; JA(B-HR) 94a-95a, 146a-147a, 302a, 555a.

[28] JA(NY) 101a (rejected affidavit of John M. Haynes).

that the 1971 agreement provided for an increase in liquidated damages for rule infractions.[29]

As can be seen, the Rules in existence from 1968 to 1974 did not in terms require that ILA labor handle FSL cargo at the pier. But the Administrative Law Judge (ALJ) found that, "[b]eginning in 1969, following the execution of the 1968 agreement, ILA longshoremen stripped full shippers' loads which were to be delivered to a warehouse for storage within a 50-mile radius of the center of the port. ILA freight handlers loaded the freight onto trucks for delivery to the warehouse." [30] Yet FSL containers whose cargo was not to be warehoused were frequently stripped by truckers at their terminals within the port area before delivery of the cargo to its beneficial owner—a practice known as "shortstopping." [31] Although there is some indication that labor-management Container Committees, established to administer the Rules,[32] considered this practice a violation of the Rules by the shipper that turned over the container,[33] it is

[29] Liquidated damages were increased to $1,000 per container in both ports. The Rules on Containers as included in the 1971-1974 Hampton Roads and Baltimore agreements are reproduced at JA(B-HR) 534a-536a and JA(B-HR) 556a-559a, respectively.

[30] 231 N.L.R.B. at 360.

[31] *Id.* at 362 ("The motor carrier's decision to strip the full shipper's load may rest upon consideration of economy, safety, or state highway and bridge regulations.").

[32] *See* Rule C.7, *reprinted in* Appendix A *infra.*

[33] 231 N.L.R.B. at 362; JA(B-HR) 150a, 318a, 354a, 475a, 998a, 1032a, 1035a-1036a, 1108a-1109a, 1140a-1143a. The Committees apparently believed that FSL containers were not expressly covered by the Rules because these containers are consigned directly to their beneficial owners and thus, unlike CFCL, LTL, and LCL containers, inherently involve no stripping prior to delivery of the cargo to its beneficial owner. Where this is not the case because shortstopping occurs, it

clear that most shortstopping was not detected by the Committees.[34]

In January 1973 a labor-management committee issued an interpretation of the Rules (the "Dublin Supplement") that brought shortstopped shippers' loads within the scope of the Rules.[35] Under the Supplement truckmen were permitted to haul FSL containers of import cargo directly to a warehouse in the port area for stripping only when the freight would be stored there for at least 30 days.[36]

The Rules on Containers included in the agreement negotiated in 1974 sought to formalize practice with respect to FSL cargo along the lines of the 1968 and 1971 agreements and the Dublin accord.[37] As the ALJ found,

would follow that FSL containers come within the scope of the Rules. *See* 231 N.L.R.B. at 355 (Fanning, Chairman, dissenting) ("The traditional exemption for shippers' loads was premised on the understanding that such loads are 'through' containers, much larger in size but properly analogous to a single item of bulk cargo. When taken to a trucker's warehouse to be stripped and repacked, they lose that identity.").

[34] 231 N.L.R.B. at 362.

[35] The Dublin Supplement is reproduced at JA(B-HR) 549a.

[36] 231 N.L.R.B. at 360; JA(B-HR) 260a-261a, 549a-551a, 1027a-1028a, 1034a. In dissent Chairman Fanning contended that the Dublin Supplement carved out an exception to the stuffing and stripping rights of the ILA with respect to *all* FSL containers stuffed and stripped within 50 miles of port by other than the employees of the cargo's beneficial owner. 231 N.L.R.B. at 355 n.11 (Fanning, Chairman, dissenting). Chairman Fanning's colleagues in the majority, however, flatly disagreed with his characterization. *Id.* at 352. The proper characterization of the Dublin Supplement, whatever it may be, is not germane to our decision.

[37] The Rules on Containers as adopted in the 1974 Baltimore and Hampton Roads agreements are reproduced at JA(B-HR) 561a-563a and JA (B-HR) 537a-543a, respectively. Because they differ in some significant respects from the 1968 and 1971 Rules, the 1974 Rules are reproduced in Appendix B to this opinion.

"Under the 1974-77 container rules, ILA labor is entitled to strip full shippers' loads, whenever such work is to be done within a 50-mile radius of the center of the port by other than the consignee's employees." [38] But FSL cargo consigned to the beneficial owner's place of business or warehoused for at least 30 days within the port area was not to be stripped by the ILA; [39] instead, the ILA would continue to receive a royalty for each container not handled by longshoremen.

Thus under the 1974 Rules, assuming that the Dublin Supplement's warehousing exception was not applicable, when employees of a trucking company before delivering FSL cargo to its beneficial owner stripped an FSL container at the company's off-pier terminal and that terminal was located within 50 miles of port, the shipping line that turned over its FSL container to the truckmen became liable for liquidated damages of $1,000 per container.

B. *Containerized Shipping in the Port of New York*

Containerized transport was first introduced in the Port of New York during the 1950s.[40] In New York, as in Baltimore and Hampton Roads, the general practice prior to containerization was for ILA labor to handle cargo piece by piece.[41] The longshoremen would load export cargo on pallets [42] and would unload and sort import cargo in preparation for delivery.[43] These work

[38] 231 N.L.R.B. at 361. *See* Rule 1(a), *reprinted in* Appendix B *infra.*

[39] *See* Rule 2, *reprinted in* Appendix B *infra.*

[40] JA(NY) 83a-89a (rejected affidavit of John M. Haynes).

[41] *Id.*

[42] A pallet is a portable platform designed for handling by forklift truck or crane and used for movement of goods.

[43] JA(NY) 83a-85a (rejected affidavit of John M. Haynes).

practices began to change in the late 1950s with the introduction of containerization. And with the challenge to existing work practices came increased labor-management conflict. Predictably, management wished to secure the efficiency gains represented by containerized shipping as soon as possible; equally predictably, the ILA wished to fulfill its members' expectations of job security.[44]

The ILA-NYSA collective bargaining agreement negotiated in 1959 was the first to contain a provision dealing with containerized shipping. At that point containerization had not yet become widespread in New York. Indeed, by one report the first fully containerized vessel was not introduced into the busy North Atlantic trade route until 1967.[45] It was nevertheless thought necessary by the parties in 1959 to achieve some level of agreement on how containerized shipping would be handled.

The 1959 collective bargaining agreement expressly recognized the right of shippers belonging to the NYSA to use containers of any kind or size without ILA restrictions that would cause the containers to be stripped and restuffed at the pier.[46] There were, however, two caveats. First, the NYSA agreed to make royalty payments to a jointly administered fund for each shippers' load container that was stuffed or stripped away from the pier by non-ILA labor.[47] Second, the agreement also stipulated that

> [a]ny work performed in connection with the loading and discharging of containers for employer members of the NYSA which is performed in the Port

[44] JA(NY) 88a-90a (rejected affidavit of John M. Haynes).

[45] JA(NY) 95a (rejected affidavit of John M. Haynes). *See International Longshoremen's Ass'n,* 221 N.L.R.B. 956, 957 (1975).

[46] JA(NY) 90a-91a (rejected affidavit of John M. Haynes).

[47] JA(NY) 91a (rejected affidavit of John M. Haynes).

> of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.[48]

Applying these terms to actual dockside disputes proved to be an arduous process fraught with difficulties. In particular, the language of the second caveat was sufficiently imprecise to require a clarification which, according to the NYSA, was issued by that shippers' association on February 28, 1962:

> Where an employer member of NYSA supplies a container which is the property of such member, to a consolidator for loading or discharging of cargo in the Port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates.[49]

As the 1960s passed, containerized shipping in the Port of New York became more widespread and ILA hostility to the innovation more pronounced. With the 1968 negotiations looming, the ILA, at its 1967 convention, assumed a hard-line position on containerization: *All* containers were to be stuffed and stripped by ILA labor at longshore rates,[50] or there was to be trouble. And trouble there was. The prolonged strike, mentioned above in the context of the situations in Baltimore and Hampton Roads, ensued and was terminated only after the appointment of a Presidential Board of Inquiry pursuant to the

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[48] *Id.*

[49] JA(NY) 92a (rejected affidavit of John M. Haynes). According to the ALJ in *International Longshoremen's Ass'n*, 221 N.L.R.B. 956 (1975), "[t]here is substantial conflict" over whether this clause and its predecessor aimed to secure LTL, LCL, and CFCL stripping and stuffing for ILA labor. *Id.* at 968. The Board itself in that case apparently believed that the provisions did not go that far. *Id.* at 960.

[50] JA(NY) 95a (rejected affidavit of John M. Haynes).

national emergency provisions of the Taft-Hartley Act.[51] The compromise ultimately struck between the parties was the same Rules on Containers that were adopted as master terms in Baltimore and Hampton Roads. Shippers' loads and other containers that came from or went to points 50 or more miles from the Port of New York were not subject to ILA stuffing or stripping requirements.[52] CFCL, LTL, and LCL containers to be stuffed or stripped within 50 miles of port—the containers at issue in this New York case—were, however, to be stuffed or stripped by ILA labor.[53]

The seemingly chronic dockside labor problems attributable to containerization continued to flare up. The 1971 collective bargaining agreement left intact the Rules adopted in 1968, but this compromise was agreed upon only after another long strike.[54] Further discord ensued, and the ILA and CONASA, which by this time had begun bargaining for the NYSA on matters pertaining to containerization, issued their Dublin Supplement in 1973 dealing with FSL containers and warehousing in the port area.[55] The collective bargaining agreement adopted in

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[51] 29 U.S.C. § 171 *et seq.* (1976).

[52] [T]he employers won the right to continue to move most containers, namely non-consolidated full shipper loads, without stuffing or stripping by union members. Thus, manufacturers' loads or full shippers' loads, as well as all containers coming from or going to points fifty or more miles from a port, constituting 80% of the containers moving in the Port of Greater New York, were excluded from the stuffing and stripping requirements.
* * *
JA(NY) 97a (rejected affidavit of John M. Haynes).

[53] *See* Title I (introductory title to 1968 Rules on Containers entitled "Containerization"), *reprinted in* Appendix A *infra*.

[54] JA(NY) 101a (rejected affidavit of John M. Haynes).

[55] *See* text at notes and notes 35-36 *supra*; JA(NY) 19a (NLRB Order Consolidating Cases, etc.).

1974 also included Rules on Containers, the final version of which manifested an intention to carry on the agreement reached in 1968 and 1971 along with the Dublin accord.[56]

C. *The Role of Truckers and Consolidators Before and After the Advent of Containerized Shipping*

The charging parties before the NLRB were the following common carriers: Houff Transfer, Inc. (Houff) and Associated Transfer, Inc. (Associated) in the case originating in Baltimore and Hampton Roads, and Dolphin Forwarding, Inc. (Dolphin) and San Juan Freight Forwarders, Inc. (San Juan) in the case originating in New York.[57] Because these charging parties alleged that secondary activities of the ILA and of CONASA and its members, including the NYSA, threatened to deprive them of part of their traditional work, we must briefly review what their traditional role has been with respect to the cargo at issue.

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[56] The relevant provisions of the 1974 Rules in New York are reproduced at JA(NY) 16a-23a and are substantially identical to the Rules adopted in Baltimore and Hampton Roads. *See* Appendix B *infra*.

Subsequent to adoption of the 1974 collective bargaining agreement, but before its termination, conflict arose between the ILA and the shippers over whether the shippers had been abiding by the Rules. The ILA announced its intention to reopen the Rules, *see* Rule 8, *reprinted at* Appendix B *infra*, and later unilaterally suspended the Rules and began to strip all containers with the exception of shippers' loads bound for destinations outside the port area. Later, the parties resolved their differences and reinstituted the Rules in clarified form. *See* JA(NY) 108a (rejected affidavit of John M. Haynes).

[57] Houff and Associated are interstate common carriers licensed by the Interstate Commerce Commission (ICC); Dolphin and San Juan possess no such license.

1. *Baltimore and Hampton Roads*

Houff and Associated are ICC-licensed interstate common carriers whose work includes transporting cargo by truck to and from the Ports of Baltimore and Hampton Roads.[58] Both carriers have terminals within 50 miles of the Port of Hampton Roads, and Houff has a terminal in Baltimore.[59] Prior to containerization, Houff, Associated, and other trucking companies made trips to the piers in Baltimore and Hampton Roads to pick up loose cargo which had been unloaded and sorted by ILA labor.[60] The cargo would then be transported by the trucking companies to their trucking stations, to their warehouses, or directly to the consignee.

Since the advent of containerization in these ports, about 1965, truckmen regularly have transported FSL container loads to beneficial owner consignees both within and beyond 50 miles of the Ports of Baltimore and Hampton Roads.[61] Prior to adoption of the 1968 collective bargaining agrement, which was the first in Baltimore and Hampton Roads to speak to the containerization issue, truckmen also picked up FSL containers at the pier, unstripped by ILA labor, and transported them to a nearby warehouse for stripping and storing.[62] Subsequent to the Rules' adoption in 1968, FSL containers whose cargo was to be stripped and warehoused in the port area were stripped by ILA labor,[63] but truckmen frequently picked up FSL containers and stripped them at their terminals

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[58] 231 N.L.R.B. at 358, 361 *et seq.*

[59] *Id.* at 358.

[60] *Id.* at 359.

[61] *Id.* at 361; JA(B-HR) 191a-192a.

[62] 231 N.L.R.B. at 360.

[63] *Id.*

when the cargo was not to be warehoused.[64] The record indicates that at least some personnel within the trucking industry were aware that this shortstopping of FSL containers within 50 miles of the port was regarded as a violation of the Rules on Containers committed by the shippers.[65]

2. *New York*

In the New York case Dolphin and San Juan employed subcontracted labor to consolidate various customers' goods by placing them into containers in preparation for shipment by sea.[66] Both companies had inland facilities within a 50-mile radius of the Port of New York.[67] The work done by Dolphin and San Juan that caused NYSA shippers to violate the Rules on Containers in the view of the Container Committee was consolidation of cargo belonging to two or more individuals into containers owned or leased by the shippers. FSL cargo is not at issue in this New York case.

Dolphin's operations antedated the adoption of the Rules on Containers by several years, although the ILA and the NYSA, as we have seen, had been negotiating over containerization since the late 1950s.[68] NYSA shippers

[64] *Id.* at 362 ("The motor carrier's decision to strip the full shipper's load may rest upon consideration of economy, safety, or state highway and bridge regulations."). *See* JA(B-HR) 154a-155a, 180a-182a, 231a, 267a-268a. *See also* text at note 31 *supra.*

[65] 231 N.L.R.B. at 352 ("These [trucking industry] officials testified only that [CONASA and the ILA] and certain shipping personnel deemed these actions to be violations, not that they actually were violations, or that the trucking industry acknowledged them to be such."); *see id.* at 356 n.22 (Fanning, Chairman, dissenting).

[66] 98 L.R.R.M. at 1277.

[67] *Id.*

[68] *See* text at notes 46-49 *supra.*

contend that they did business with Dolphin only because Dolphin listed Massachusetts as the point of origin for the containers it filled instead of the actual point within the port area.[69] San Juan was established in 1972, several years after the Rules on Containers were first adopted.[70] The containers shipped by San Juan apparently indicated Chicago as the point of origin of the containers, although they in fact were consolidated in the New York area.[71]

D. *The Incidents Precipitating the Present Disputes*

1. *Hampton Roads*

On September 24, 1974 Associated picked up eight FSL containers from United States Lines at a Norfolk pier and hauled them to its Virginia Beach terminal, where it stripped them.[72] Representatives of United States Lines

[69] Petitioners' brief (NY) at 17-18; *see* JA(NY) 120a-121a (rejected affidavit of William O. Gohlke, former officer of Sea-Land Services, Inc. and Seatrain Lines, Inc.):

> It was quite apparent to me that though the bills of lading and other documentation suggested that the Dolphin cargo was booked as having an originating point in Massachusetts, this was not the case. The recordings of the turnaround of containers and related equipment issued on Dolphin bookings clearly showed that insufficient time elapsed between the issuance and return of the equipment to permit the containers to be transported to Massachusetts and back. This left the unmistakable impression that the loading of the containers had to have taken place in the New York-New Jersey proximity of the Seatrain operation. It was not Seatrain's concern or my concern as an official of Seatrain to inquire into this practice. Seatrain's and my objective was to obtain business and transporting containers to and from Puerto Rico. * * *

[70] JA(NY) 164a.

[71] JA(NY) 156a-174a.

[72] 231 N.L.R.B. at 363; JA(B-HR) 195a-196a. Apparently the documentation presented to United States Lines by Associated did not indicate that the containers would be stripped

and the ILA, upon inspection of Associated's terminal, determined that, because of Associated's shortstopping of the containers, United States Lines was in violation of the Rules on Containers.[73] The HRSA-ILA Container Committee later ratified their determination.[74] Liquidated damages of $1,000 per container were imposed on United States Lines, which demanded reimbursement from Associated.[75] Upon the refusal of Associated to comply with the demand, United States Lines severed business relations with Associated.[76]

2. *Baltimore*

On September 24, 1974 Houff picked up in the Port of Baltimore two FSL containers from United States Lines and one from Lavino Shipping Company and transported them to its terminal in the Baltimore area for stripping before delivery of the cargo to the respective

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at Associated's terminal by Associated's employees. There is no mention in the correspondence subsequent to the incident that the documentation presented to United States Lines served to notify the shipper of Associated's intention to strip the container, JA(B-HR) 655a-661a, and the ALJ merely noted that the consignees, whose names and locations would have been found on the delivery orders and bills of lading, were located in Tennessee and North Carolina, 231 N.L.R.B. at 363. *See id.* at 356 n.18 (Fanning, Chairman, dissenting) ("[W]hen a container is released to a motor carrier, the delivery order specifies that the cargo is to be transported to the consignee. Intent to shortstop is thereby difficult to ascertain * * *.").

[73] 231 N.L.R.B. at 363.

[74] *Id.* The ruling was based on Rules 1(a)(3) and 2B.(2), *reprinted in* Appendix B *infra*.

[75] 231 N.L.R.B. at 363.

[76] *Id.*

owners.[77] Once it was determined that this shortstopping took place, United States Lines and Lavino were assessed $1,000 per container by the STAB-ILA Container Committee, as stipulated by the Rules on Containers, and sought indemnification from Houff.[78] When the trucking company did not indemnify the two shippers, they ceased doing business with Houff.[79]

3. *New York*

Dolphin and San Juan engaged in consolidation of CFCL, LCL, and LTL cargo into containers within 50 miles of the Port of New York.[80] When this practice was discovered, the NYSA shippers that had been supplying Dolphin with containers—Maritime Transportation Management, Inc. (MTM) and Transamerica Trailer Transport, Inc. (TTT)—were fined $4,000 and $43,000, respectively, in liquidated damages.[81] As a result of the imposition of these damages, MTM and TTT refused to furnish the consolidators with any additional containers.[82]

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[77] *Id.* at 362. Apparently the documentation presented to United States Lines and to Lavino did not indicate that the containers would be stripped at Houff's terminal by Houff's employees. *Id.* ("The delivery order and bill of lading issued to Houff for the U.S. Lines containers showed the cargo was destined to Union Carbide Corporation, Alloy, West Virginia."); JA(B-HR) 1052a. *Compare* 231 N.L.R.B. at 356 n.18 (Fanning, Chairman, dissenting).

[78] 231 N.L.R.B. at 362. The ruling was based on Rules 1(a)(3) and 2B.(2), *reprinted in* Appendix B *infra*.

[79] 231 N.L.R.B. at 362-363.

[80] 98 L.R.R.M. at 1277.

[81] *Id.*; JA(NY) 25a (NLRB Order Consolidating Cases, etc.). The ruling was based on Rule 1(a)(1), *reprinted in* Appendix B *infra*.

[82] 98 L.R.R.M. at 1277.

II. Secondary Boycotts, Work Preservation, and the Rules on Containers

The common carriers, charging parties before the NLRB, argued successfully there that certain of the Rules on Containers and efforts by the ILA to enforce those Rules violated the congressional proscription of secondary boycotts.[83] Petitioners here contend that the Rules and action supporting the Rules had a legal primary purpose—work preservation—and that the NLRB committed an error of law in holding otherwise. To respond to these contentions we must peruse the law of secondary boycotts, including the work preservation doctrine, and determine whether the Board applied a proper understanding of the law to the cases before us.

A. *The Proscription of Secondary Boycotts*

The NLRA's proscription of secondary boycotts is premised on the distinction between primary and secondary union activity.[84] As fundamentally important as this distinction is, however, "it does not present a glaringly bright line." [85] Indeed, both the NLRB and the courts, in interpreting the congressional mandate prohibiting secondary activity, have necessarily undertaken, as Justice Frankfurter put it, the task of drawing lines "more nice than obvious." [86]

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[83] The precise Rules challenged were those that were held applicable to the respective charging parties' activities. *See* notes 74, 78, & 81 *supra*.

[84] *See generally* Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. Pa. L. Rev. 1000, 1004-1018 (1965) (describing "relevance and content" of the primary-secondary dichotomy).

[85] *Local 761, IUERMW v. NLRB*, 366 U.S. 667, 673 (1961) (opinion of Frankfurter, J.).

[86] *Id.* at 674.

The relevant statutory provisions are Sections 8(b)(4)(B) and 8(e) of the NLRA.[87] The former—once described as "surely one of the most labyrinthine provisions ever included in a federal labor statute" [88]—prohibits unions and their agents from engaging in activities the object of which is forcing one employer to cease doing business with another.[89] Although the statutory language does not in terms focus on secondary activity,[90] both the

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[87] 29 U.S.C. §§ 158(b)(4)(B), (e) (1976).

[88] Aaron, *The Labor-Management Reporting and Disclosure Act of 1959 (pt. 2)*, 73 Harv. L. Rev. 1086, 1113 (1960).

[89] *See* Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363, 1364 (1962).

[90] **(b) Unfair labor practices by labor organization**

It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representatives of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in his clause (B) shall

legislative history [91] and a proviso that the prohibition does not apply to "any primary strike or primary picketing" [92] make clear the cardinal importance of the primary-secondary distinction. The latter provision, Section 8(e),[93] proscribes not secondary activity, but "collective-bargaining contracts whereby the employer ceases or agrees to cease doing business with any other person." [94] Although the provision literally prohibits any understanding aimed at forcing a cessation of business,[95] it is clear

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be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

29 U.S.C. § 158(b)(4)(B) (1976).

[91] *See, e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess. 22 (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 428 (1948) (hereinafter cited as LEGISLATIVE HISTORY).

[92] 29 U.S.C. § 158(b)(4)(B) (1976).

[93] 29 U.S.C. § 158(e) (1976).

[94] *NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters*, 429 U.S. 507, 517 (1977).

[95] It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an

that this proscription of "hot cargo" agreements embodies the same distinction between lawful primary and unlawful secondary activity as Section 8(b)(4)(B), and applies only to agreements with secondary objectives.[96]

The general aim of Congress in passing these prohibitions is clear: that is, according to one commentator, "to protect neutral employers—those not directly involved in a labor dispute—from direct union sanctions." [97] The Senate Report accompanying the Taft-Hartley Act casts this general purpose in only slightly more specific terms: Congress sought to proscribe "a strike against employer A [the secondary employer] for the purpose of forcing that employer to cease doing business with employer B [the primary employer] * * * (with whom the union has a dispute)." [98] Unfortunately, attempts to characterize congressional intent with any more specificity have not

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industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

29 U.S.C. § 158(e) (1976).

[96] *See NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters*, 429 U.S. 507, 517 (1977) (provision interpreted "as having no broader reach than § 8(b)(4) itself"); *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 620, 623-629 (1967).

[97] H. WELLINGTON, LABOR AND THE LEGAL PROCESS 275 (1968).

[98] S. Rep. No. 105, 80th Cong., 1st Sess. 22 (1947), *reprinted in* LEGISLATIVE HISTORY, *supra* note 91, at 428.

been notably successful.[99] Nevertheless, the NLRB and the courts are required in the course of deciding cases to apply the general congressional proscription in various specific contexts: [100] in cases, for example, where there are ally employers; [101] in common situs situations; [102] in consumer picketing cases; [103] and in the context of work preservation agreements.[104] The last of these contexts is the one with which we are presented here.

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[99] Professor Cox, for example, after reviewing the possibilities presented under the current legislation, concluded that the problems in applying the secondary boycott provisions "can be minimized by more careful statutory classification." A. COX, LAW AND THE NATIONAL LABOR POLICY 38 (1960).

[100] *See* Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 KANS. L. REV. 651, 658-703 (1971) (describing the various contexts in which secondary boycotts occur).

[101] *See, e.g., NLRB v. Business Mach. & Office Appliance Mechanics Conf. Board*, 228 F.2d 553, 559 (2d Cir. 1955) ("We therefore hold that an employer is not within the protection of § 8(b) (4) [(B)] when he knowingly does work which would otherwise be done by the striking employees of the primary employer and where this work is paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations.").

[102] *See, e.g., Local 761, IUERMW v. NLRB*, *supra* note 85, 366 U.S. at 680-682 (the portion of the struck employer's premises used by employees of independent contractors who perform tasks connected to the normal operations of the struck employer are not exempted from strike activity by the struck employer's employees under § 8(b) (4) [(B)].

[103] *See, e.g., NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 71-72 (1964) (picketing confined to persuading customers to cease buying the product of the primary employer is not proscribed by § 8(b) (4) (ii) (B)).

[104] *See, e.g., NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters*, 429 U.S. 507, 517 (1977) ("Section 8(e) does not prohibit agreements made for 'primary' purposes, including the

B. *The Supreme Court's Work Preservation Doctrine:* National Woodwork *and* Pipefitters

An immutable feature of modern industrial economies is their dynamism. In large part this is due to the profound impact that technological advances have on the means of production. One can turn to any sector of our economy—from communications to transportation to food processing—and witness the blinding speed with which modern technology can alter our conception of the status quo.

It is inevitable that such rapid change will cause cleavages within a society; one example is the displacement of workers whose jobs and skills are tied to supplanted forms of technology. As mentioned earlier, there is no legislative scheme in this country designed specifically to deal with labor disputes engendered by technological innovations.[105] Such disputes instead are channeled into the system of collective bargaining; the labor relations questions raised by changes in the means of production are answered by the parties themselves rather than through state intervention.[106]

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purpose of preserving for the contracting employees themselves work traditionally done by them."). Alleged hot cargo clauses may have application in areas other than work preservation, but these are of no concern here. *See* Goetz, *supra* note 100, 19 KANS. L. REV. at 683-694.

[105] One commentator has lamented that "[t]he pressures created by momentous problems of productivity and job security under changing technological and market conditions are contained or released by no more sensitive a legal instrument than a legislative determination to protect neutrals from being drawn into the disputes of others." Lesnick, *supra* note 84, 113 U. PA. L. REV. at 1041.

[106] An interesting contrast is Great Britain, which not only has a system of compensation designed to alleviate the strain on workers who are made "redundant," *see* note 11 *supra*, but which also has attempted to solve its version of the containerization controversy through direct parliamentary intervention. *See* Dock Work Regulations Act 1976.

The courts in this country, including the Supreme Court, have wisely allowed for resolution of such disputes through the collective bargaining process even though the resolutions agreed to by the parties often tread perilously close to the congressional proscription of secondary boycotts.[107] The classic example of such a resolution is an agreement by the parties to preserve work for the contracting employer's employees when the nature or the location of that work has changed due to technological advances. Inescapably the effects of such agreements are felt upon employers (and their employees) other than the contracting employer. But those effects are incidental to the agreement with the contracting employer and not necessarily reflective of a secondary objective such as organizing the employees of the other affected employers. Thus under the NLRA's proscription of secondary boycotts, these work preservation agreements, as well as primary collective action enforcing their terms, are not considered illegal.[108]

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[107] The leading Supreme Court cases are discussed in text at notes 109-132 *infra*. For cases from the Courts of Appeals, *see, e.g., American Boiler Manufacturers Ass'n v. NLRB*, 404 F.2d 547, 561 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970) (no violation of the NLRA's prohibition of secondary boycotts when the union's conduct was addressed to enforcement of its collective bargaining agreement, when the conduct related solely to preservation of the traditional tasks of jobsite plumbers, and when the union had no objectives elsewhere); *Meat & Highway Drivers, Dockmen, etc., Local 710 v. NLRB*, 335 F.2d 709, 713 (D.C. Cir. 1964) ("If the jobs are fairly claimable by the unit, they may, without violating either § 8(e) or § 8(b)(4)(A) or (B), be protected by provision for, and implementation of, no-subcontracting or union standards clauses in the bargaining agreements." (footnotes omitted)).

[108] *See* note 184 *infra* (citing cases); H. WELLINGTON, *supra* note 97, at 275 ("the [NLRA] does not interdict the primary strike *or its attendant consequences.*" (emphasis added; footnote omitted)).

The validity of such agreements under the NLRA is supported by sound policy reasons. First, it is of paramount importance that Congress, rather than imposing a solution, has chosen to allow the parties themselves to deal with labor problems generated by technological change. If the courts and the NLRB were to upset reasonable efforts by the parties to achieve some level of accommodation, this broad policy choice of Congress would be frustrated. Second, unwarranted interference by the NLRB and the courts could inject a massive dose of uncertainty into the planning functions of both management and labor. If the parties suspect that reasonable attempts to accommodate technological advances will be torn asunder by a reviewing agency or court, they will be reluctant to undertake the effort. Workers particularly could be obdurate when asked to compromise some degree of job security for the sake of efficiency if that compromise might later be cast aside. In the event of industrial disruption caused by such induced intransigence there would be no winners: not only would the workers lose work, but also the efficiency gains represented by the innovation would needlessly, if perhaps temporarily, be lost to management and to our national economy.

Two major Supreme Court cases control our understanding of the legality of work preservation agreements under the NLRA. The first is *National Woodwork Manufacturers Ass'n v. NLRB*,[109] a case in which a provision in a collective bargaining agreement was challenged under Section 8(e).[110] The contested clause stipulated that bargaining unit employees (carpenters) would not handle any doors that were "pre-fitted," *i.e.*, made ready for installation prior to shipment to the jobsite.[111] The ob-

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[109] 386 U.S. 612 (1967).

[110] 29 U.S.C. § 158(e) (1976).

[111] 386 U.S. at 615-616.

ject of this provision, according to the Administrative Law Judge, the Board, and ultimately the Supreme Court, was preservation of the fitting work performed traditionally by onsite carpenters.[112]

In upholding the provision the Court expounded upon the nature of the inquiry that courts and the NLRB must undertake when determining the legality of such agreements. "The determination * * * cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the contracting employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." [113] The Court continued: "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." [114] As one commentator has written of *National Woodwork*, "Since the object of the union was to preserve work for unit employees, and since it had no quarrel with the union status or other personnel relations of the door manufacturer, the contract provision was upheld." [115]

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[112] *Id.* at 645-646.

[113] *Id.* at 644 (footnote omitted). The Court provided an elaboration of "all the surrounding circumstances" in a footnote:

> As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry. * * *

Id. at 644 n.38.

[114] *Id.* at 645 (footnote omitted).

[115] R. GORMAN, LABOR LAW 265 (1976). On the day *National Woodwork* was decided the Court also handed down a companion case. In *Houston Insulation Contractors' Ass'n v. NLRB*, 386 U.S. 664 (1967), the Court, relying largely on the reasoning in *National Woodwork*, held that a work preservation agreement between a company and a local union could be effectuated by another local of the same union. *See* R. GORMAN, *supra*.

In a case decided in 1977 the Supreme Court once again confronted the work preservation issue, but with a different result. In *NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters*,[116] the Court refused to approve union activity in support of what appeared to be a work preservation clause. In *Pipefitters* a subcontractor on a construction project had agreed to the contested clause in its labor agreement with its steamfitter employees. Under the clause all pipe threading and cutting were to be performed on the jobsite by the steamfitters, who had traditionally performed this work.[117] This provision notwithstanding, the main contractor decided, and the subcontractor agreed, to order pre-threaded and pre-cut pipes for the job. The steamfitters refused to install the pipes, and a work disruption ensued.[118]

The NLRB, confronted with this factual situation, found that the contested clause had a primary purpose—work preservation [119]—but that the union's activity to enforce the agreement did not.[120] The NLRB's holding was premised on its "right to control" test, which is based on the determination whether the coerced employer —in *Pipefitters*, the subcontractor—could "control," *i.e.*, award, the work sought by the union.[121] If the coerced

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[116] 429 U.S. 507 (1977).

[117] *Id.* at 512.

[118] *Id.* at 511-513.

[119] 204 N.L.R.B. 760, 760 (1973).

[120] *Id.*

[121] 429 U.S. at 521. *See* R. DERESHINSKY, THE NLRB AND SECONDARY BOYCOTTS 117 (1972) ("Essentially, the test required that the employer have the right to control the matter at issue in order to be designated a primary employer.").

employer cannot control the work, then it follows that the union's actions are directed not at this employer, but at another employer who in fact does control the work. In *Pipefitters* the object of the strike was to obtain work controlled not by the subcontractor, with whom the steamfitters had agreed to the lawful work preservation clause, but by the main contractor; in the Board's view this meant that the object of the boycott was secondary.[122]

The decision of the NLRB was set aside on appeal by this court,[123] but the Supreme Court reversed our decision.[124] In so doing the Supreme Court was exceedingly careful to cast its decision in terms of its reasoning in *National Woodwork*. As the Court discerned the issue in *Pipefitters*, for example, it turned on "whether the boycott was 'addressed to the labor relations of the contracting employer *vis-à-vis* his own employees.'" [125] This formulation of the issue corresponded to the Court's view of the scope of Section 8(e), which also came from *National Woodwork*. The provision "does not prohibit agreements made for 'primary' purposes, including the purpose of preserving for the contracting employees themselves work traditionally done by them." [126]

In holding that the strike in *Pipefitters* was unlawful secondary activity, the Supreme Court affirmed several points of law that merit reiteration here. First, the Court supported *National Woodwork*'s admonition that courts and the NLRB examine "all the surrounding circumstances" [127] when assessing the validity of a work preservation clause.[128] Second, the Court also affirmed *National Woodwork*'s insistence that to be considered a legal attempt at work preservation the challenged boycott must focus on the "labor relations of the contracting employer *vis-à-vis* his own employees." [129] Third, the Court held that a provision in a collective bargaining agreement cannot itself immunize union activity that otherwise is secondary in character.[130] Fourth, the NLRB, according to the Court, was perfectly within the law in applying its right to control test as a means of delineating the scope of lawful primary activity.[131] Fifth, the Court reaffirmed that where the NLRB's decision is based on a proper understanding of the prevailing law, appellate review is confined to a determination of "whether the Board's findings were 'supported by substantial evidence on the record considered as a whole.'" [132]

Before applying these legal standards to the cases before us, we must make a brief excursus into the litigation history of the Rules on Containers.

C. *The Rules on Containers in the Courts*

The Rules on Containers have been the subject of extensive litigation over the past decade. The Second Circuit was the first Court of Appeals to adjudge the validity of the Rules when, in *Intercontinental Container Transport Corp. v. NLRB (ICTC)*,[133] a consolidator chal-

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[122] 204 N.L.R.B. at 760.

[123] *Enterprise Ass'n of Steam, etc. Pipefitters v. NLRB*, 521 F.2d 885 (1975) (*en banc*), *rev'd*, 429 U.S. 507 (1977).

[124] 429 U.S. at 532.

[125] *Id.* at 511 (*quoting National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. at 645).

[126] *Id.* at 517 (*citing National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. at 635).

[127] 386 U.S. at 644.

[128] 429 U.S. at 524.

[129] 386 U.S. at 645, *quoted at* 429 U.S. at 511, 528.

[130] 429 U.S. at 514-521.

[131] *Id.* at 521-528.

[132] *Id.* at 531 (*quoting* 29 U.S.C. § 160(e) (1976)).

[133] 426 F.2d 884 (2d Cir. 1970).

lenged the Rules as a conspiracy in restraint of trade and hence as violative of the Sherman Act.[134] To decide whether the Rules amounted to an antitrust violation the court had to determine whether the union's activities of bargaining for and enforcing the Rules fell within the labor exemption to the Sherman Act.[135] This determination rested in part on "whether the action is in the union's self-interest in an area which is a proper subject of union concern." [136]

The court had little difficulty in finding that the Rules were in the interest of the union and its members. Noting that the Supreme Court has repeatedly held that preservation of jobs is within the area of proper union concern,[137] the court concluded that "[t]he [Rules] have as their object the preservation of work traditionally performed by longshoremen covered by the agreement." [138] Rather than aiding a group of businessmen to violate the Sherman Act, "the union here, acting solely in its own self-interest, forced reluctant employers to yield to certain of its demands." [139] The agreement between management and labor on the containerization issue was held within the labor exemption to the antitrust laws.

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[134] 15 U.S.C. § 1 *et seq.* (1976).

[135] *See Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). For a recent statement of the Supreme Court's views on the labor exemption to the antitrust laws, *see Connell Constr. Co. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975).

[136] 426 F.2d at 887.

[137] *Id.* (*citing National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612 (1967); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *Order of Railroad Telegraphers v. Chicago & Northwestern R. Co.*, 362 U.S. 330 (1960)).

[138] *Id.*

[139] *Id.* at 888.

After the Second Circuit's decision in *ICTC*, unfair labor practice charges were filed against the ILA and the NYSA by two off-pier consolidators that operated near the Port of New York. The charges alleged that the Rules on Containers were an agreement to engage in a secondary boycott—a "hot cargo" agreement—contrary to the NLRA [140] and that enforcement of the Rules by the ILA was also violative of the Act's proscription of secondary boycotts.[141] The Administrative Law Judge assigned to the case upheld the Rules as valid work preservation clauses, but he was reversed by the NLRB.[142] The ILA and the NYSA sought review of the NLRB's decision in the Second Circuit, which, in *International Longshoremen's Ass'n v. NLRB* (*Conex*),[143] affirmed the Board.

The court noted its previous decision in *ICTC*, but found the holding in that case distinguishable because *ICTC* arose in an antitrust context.[144] In *Conex*, by contrast, the court believed that a measure of deference was owed the NLRB and that this factor allowed it to affirm the Board without directly overruling its decision in *ICTC*.[145] The NLRB, in reviewing the claim of the ILA

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[140] 29 U.S.C. § 158(e) (1976).

[141] 29 U.S.C. § 158(b) (4) (ii) (B) (1976).

[142] *International Longshoremen's Ass'n*, 221 N.L.R.B. 956 (1975).

[143] 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). Circuit Judge Feinberg dissented from the majority decision issued by Senior Circuit Judge Moore and Senior District Judge Wyzanski, sitting by designation.

[144] *Id.* at 708 n.1.

[145] Correspondingly, the District Court for the District of New Jersey, in a suit brought subsequent to the Second Circuit's decision in *Conex*, held that, just as an antitrust determination does not control a labor case, a labor law determination of unlawful work acquisition does not obviate the need for inquiry under the antitrust laws. The court denied sum-

and the NYSA that the Rules were valid under the Supreme Court's work preservation doctrine enunciated in *National Woodwork*, had found that the work at issue was not the loading and unloading of ships, the traditional work of the ILA, but the off-pier stripping and stuffing of containers.[146] In the relatively few years since the advent of containerization, off-pier stripping and stuffing of containers had been performed by the employees of consolidators; hence the ILA was really engaged in work acquisition rather than work preservation.[147] This conclusion, according to the divided Second Circuit panel, was "supported by substantial evidence and by sound analysis."[148] The Board's order thus was enforced.

The First Circuit, in *International Longshoremen's Ass'n v. NLRB*,[149] reached a conclusion similar to that of the Second Circuit in *Conex*. The panel was presented with a dispute apparently generated by an expansive interpretation of the Rules by a Puerto Rican local of the ILA, Local 1575. Although observing that *Conex* was "strikingly similar" to its case,[150] the First Circuit went on to note that "[t]he fact situation we face presents a slightly stronger case for enforcement under *National Woodwork* than did the situation considered by the Second

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mary judgment in favor of antitrust claims that grew out of *Conex*. *See Consolidated Express, Inc. v. New York Shipping Ass'n*, 452 F.Supp. 1024, 1036-1044 (D. N.J. 1977), *rev'd on other grounds*, —— F.2d —— (3d Cir. Nos. 78-1529 & 78-1530, decided April 16, 1979).

[146] 221 N.L.R.B. at 959.

[147] *Id.* at 959-961.

[148] 537 F.2d at 712.

[149] 560 F.2d 439 (1st Cir. 1977).

[150] *Id.* at 442-443.

Circuit."[151] The NLRB had found that Local 1575 wished to apply the Rules not only so that any consolidating work would be done by ILA labor at the pier, but also so that members of the local would displace the non-union employees at the consolidator's facilities.[152] Hence the union, through its local, had manifested an interest not only in work preservation, but also in union organization of the excluded employer. The union's interest in the labor relations of the excluded employer was in itself sufficient to make *National Woodwork*'s work preservation exception to secondary boycotts inapposite.[153] Again, the Board's order was enforced.[154]

The Rules on Containers also have been reviewed by the Fourth Circuit in a case arising out of the instant proceeding in the Port of Hampton Roads. In *Humphrey v. International Longshoremen's Ass'n*,[155] that circuit vacated and remanded the District Court's order denying a temporary injunction sought by the Regional Director of the NLRB under 29 U.S.C. § 160(*l*) (1976).[156] The

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[151] *Id.* at 445.

[152] *Id.*

[153] *Id.* at 445-446.

[154] The First Circuit also discussed the Supreme Court's decision in *Pipefitters*, which was handed down just six days after oral argument in the First Circuit case. The First Circuit reasonably interpreted *Pipefitters* as supportive of the Board's discretion in assigning degrees of importance to the various circumstances involved in each case. 429 U.S. at 524. The First Circuit concluded that the Supreme Court's reasoning in *Pipefitters* "remove[s] any lingering doubts as to the enforceability of the Board's present order." 560 F.2d at 446.

[155] 548 F.2d 494 (4th Cir. 1977).

[156] 401 F.Supp. 1401 (E.D. Va. 1975), *vacated*, 548 F.2d 494 (4th Cir. 1977). *Compare* the District Court's conflicting decision in *Humphrey v. International Longshoremen's Ass'n*, D. Md. No. Y-75-1395, decided March 25, 1976 (unreported).

District Court had held that the NLRB did not have reasonable cause to believe that the Rules violated the NLRA.[157] The Fourth Circuit, however, found that the District Judge had erred because the work in controversy was not the ILA's traditional work of loading and unloading ships, but the off-pier work of stripping and stuffing containers.[158] Consequently, the court "conclude[d] that [the NLRB] ha[d] ample reasonable cause to believe that appellees are violating the Act." [159] The court ordered that on remand the District Court enter the appropriate injunction.

D. *Work Preservation and the Rules on Containers*

Under the Rules on Containers included in the 1974-1977 collective bargaining agreement, ILA labor was entitled to strip and stuff FSL containers whenever that work would otherwise be done within 50 miles of port by workers other than the employees of the cargo's beneficial owner.[160] Houff and Associated complained to the NLRB that this provision and its enforcement by the ILA in the Ports of Baltimore and Hampton Roads allowed ILA labor to acquire work of Houff and Associated rather than to preserve work for members of the ILA. Also under the 1974-1977 Rules, ILA labor was entitled

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[157] 401 F.Supp. at 1407.

[158] Circuit Judge Craven dissented from the majority opinion authored by Circuit Judge Russell and joined by Chief Judge Markey of the United States Court of Customs and Patent Appeals, sitting by designation.

[159] 548 F.2d at 500 (footnote omitted).

[160] *See* Rules 1(a)(2), (3), and 2B.(2), *reprinted in* Appendix B *infra*. The Dublin Supplement, *discussed in* text at notes 35-36 *supra*, exempted from these provisions FSL containers whose cargo was to be stripped within the 50-mile radius and stored in a warehouse for at least 30 days. *See* Rule 2B.(4), *reprinted in* Appendix B *infra*.

to stuff and strip all LCL, LTL, and CFCL containers that originated or terminated within 50 miles of port.[161] Dolphin and San Juan complained to the NLRB that this provision and its enforcement by the ILA in the Port of New York served to acquire work traditionally done by Dolphin and San Juan rather than to preserve work for members of the ILA. To decide whether the NLRB's receptivity to these charges was well founded, we must apply the teaching of *National Woodwork* and *Pipefitters* to the NLRB's decisions.[162]

1. *All the surrounding circumstances*

Did the Board, in characterizing the challenged Rules as work acquisition rather than work preservation clauses, examine "all the surrounding circumstances"? [163] When defining the work in controversy—the first step in determining whether the union was engaged in work preservation or work acquisition [164]—the Board settled on off-pier stripping and stuffing of containers.[165] Because long-

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[161] *See* Rule 1(a)(1), (2), *reprinted in* Appendix B *infra*.

[162] *See* text at notes 127-132 *supra* (enumerating points of law from *National Woodwork* and *Pipefitters*).

[163] *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 644 (1967); *see NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters*, 429 U.S. 507, 524 (1977).

[164] *See International Longshoremen's Ass'n*, 221 N.L.R.B. 956, 959 (1975) ("in order to properly evaluate the validity of ILA's claim to the work, 'it is essential to define with some precision the work in controversy since that is the predicate upon which the issue of work preservation must turn.'" (*quoting* ALJ)).

[165] *See* 231 N.L.R.B. at 352, 365 (off-pier stripping of FSL containers within 50 miles of port); 98 L.R.R.M. at 1277 ("traditionally the off-pier stuffing and stripping of containers was performed by consolidating companies and not longshoremen").

shoremen have always done their work on the piers, the Board reasoned, they could not traditionally have performed the work in controversy.[166] Instead, employees of consolidators and trucking companies with off-pier terminals did the work of stuffing and stripping containers away from the pier.[167] Hence for ILA labor to lay claim to this work amounted to work acquisition rather than to preservation of traditional ILA work..[168]

This formulation of the work in controversy, however, could not reasonably have been based on "all the surrounding circumstances" as required by *National Woodwork* and *Pipefitters*.[169] When a technological innovation is introduced in the workplace, new work may be created and may initially be performed, as in these cases, by employees other than those who worked with the old technology. The crucial question is how best to rationalize the work that results from the innovation into traditional work patterns. As a rule, this cannot be done by ignoring those traditional work patterns when defining the work in controversy. But that is precisely what the NLRB has done here. Rather than define a category of work based on work patterns both prior and subsequent to the innovation, the Board has defined the work in controversy specifically in terms of the innovation, thus *by definition* removing any opportunity for pre-innovation workers to preserve their work. Under such a formulation the Supreme Court's work preservation doctrine is sapped of all life.[170]

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[166] 231 N.L.R.B. at 365; 98 L.R.R.M. at 1277.

[167] 231 N.L.R.B. at 365; 98 L.R.R.M. at 1277.

[168] 231 N.L.R.B. at 365; 98 L.R.R.M. at 1277.

[169] 429 U.S. at 524; 386 U.S. at 644.

[170] The Board's definition of the work in controversy in the instant cases stands in vivid contrast to its definition in *Pipefitters*. In the latter case the NLRB held that the provision at issue was a valid work preservation clause, 204 N.L.R.B. at

There may be cases, of course, in which work engendered by the technological innovation is so different in character from the traditional work that claims based on that traditional work can rightly be discounted, even ignored. But we are not presented with such a case here. The overriding similarities between the traditional work of longshoremen and the work of stuffing and stripping containers are evident.[171] Longshoremen have historically

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760, because the clause "was for the purpose of preserving work [that the pipefitters] had traditionally performed." *Id.* That traditional work was the cutting and threading of pipes, a category that, unlike the one chosen in the present cases, takes into account work patterns both prior and subsequent to the innovation. This definition of the work in controversy in *Pipefitters* was not upset by the Supreme Court. 429 U.S. at 521 n.8. Rather, the Court focused primarily on the Board's application of the right to control test. As put by the Court, "The question now before us is whether a union seeking the kind of work traditionally performed by its members at a construction site violates § 8(b)(4)(B) when it induces its members to engage in a work stoppage against an employer who does not have control over the assignment of the work sought by the union." *Id.* at 510-511. The right to control test is discussed in the context of the instant cases in text at notes 187-192 *infra*.

[171] Note the expansive language used by the NLRB when it originally certified the longshore unit in the Port of New York:

> All longshore employees engaged *in work pertaining to the* rigging of ships, coaling of same, *loading and unloading of cargoes*, including mail, ships' stores and baggage, handling lines in connection with the docking and undocking of ships, including hatch bosses; cargo repairmen, checkers, clerks and time keepers and their assistants, including head receiving and delivery clerks; general maintenance, mechanical and miscellaneous workers; horse and cattle fitters, grain ceilers, and marine carpenters, in the Port of Greater New York and vicinity * * *.

New York Shipping Ass'n, Inc., 116 N.L.R.B. 1183, 1188 (1956) (emphasis added; footnote omitted).

loaded and unloaded ocean-borne cargo, which not only has meant loading the cargo into and out of the hold of the ship, but also has meant sorting the cargo and loading it on to equipment such as pallets.[172] From the longshoremen's standpoint, therefore, containerization merely represents a change in equipment.[173]

Further, the very nature of containers belies any notion that they present work distinctly different from and unrelated to traditional longshoremen's work. As Judge Friendly recently observed in another context, "Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds." [174] The Supreme Court,

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[172] *See* text at notes and notes 9, 18, & 43 *supra*.

[173] Although the location of the work has changed as well, in the sense that the stripping and stuffing at controversy here is done off pier, this is not an immutable characteristic of the work; it just as easily could be done on pier. That the NLRB found good reason for containers to be stripped before being trucked—to meet state highway and bridge laws, to better balance the cargo, to use trailer space efficiently (respondent's brief (B-HR) at 8)—is therefore immaterial. The essential stripping need not occur away from the dock. Moreover, the challenged Rules affect only those containers that are to be stripped or stuffed within 50 miles of port; the shift of this work back to the dock is not, therefore, implausible.

It should be noted that use of the new equipment—containers—does not require that ILA labor undergo retraining. But even if it did, this would not perforce mean that efforts to claim work involving the new equipment would be secondary. *See* Note, *Secondary Boycotts and Work Preservation*, 77 YALE L. J. 1401, 1411 (1968) ("[I]f technological change requires employee retraining, nothing in the primary-secondary rationale justifies forbidding the union to claim and preserve jobs." (footnote omitted)).

[174] *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 53 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). This case held that the Longshoremen's and Harbor Workers' Compensation Act covers employees stuffing and stripping containers away from the ships that carried them.

in affirming Judge Friendly's observations, wrote of containerization: "In effect, the operation of loading and unloading has been moved shoreward; the container is a modern substitute for the hold of the vessel." [175] The correspondence between the shift to containerized shipping and the sharp reduction in employment opportunities for longshoremen bears witness to the wisdom of these observations.[176]

We hold that the NLRB committed reversible legal error by ignoring circumstances crucial to responsible application of the Supreme Court's work preservation doctrine enunciated in *National Woodwork* and *Pipefitters*. If the NLRB cannot, as it has not in these cases, establish that the new work is sufficiently unrelated to the old work to present a clear break with the past, it must not ignore traditional work patterns when defining the work in controversy. In this case proper consideration of the relevant work patterns both prior and subsequent to the advent of containerization might have led to a

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[175] *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 270 (1977), *aff'g Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976).

[176] *See International Longshoremen's Ass'n*, 221 N.L.R.B. 956, 957 (1975) ("As fewer cargo units reached the piers, there was a proportionate decrease in loading and unloading work for the longshoremen represented by [the] ILA."); note 10 *supra* (citing two estimates of productivity increases due to containerization); JA(B-HR) 457a (Gleason testimony) (the number of longshore employees and the number of man-hours they have worked have gone down dramatically in recent years). It is useful in this context to point out that the Supreme Court in *National Woodwork* provided as an example of a "surrounding circumstance" "the threat of displacement by the banned product or services." 386 U.S. at 644 n.38.

different categorization for the work in controversy. The loading and unloading of ocean-borne cargo, with its directly related peripheral tasks such as sorting cargo, is an example of one possible categorization.[177] It is the province of the NLRB to settle upon the correct categorization, of course, and we offer no opinion on the proper one. We simply hold that the Board erred as a matter of law by ignoring traditional work patterns when defining the work in controversy.[178]

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[177] It is not difficult to imagine a party unhappy with this court's decision today subjecting that decision to the following exercise in *reductio ad absurdum*: Under the court's ruling, cannot longshoremen literally chase containers around the country, demanding the right to stuff and strip them? There is a short answer: No. Our decision does not radiate beyond the Rules on Containers, which are restricted in terms to a 50-mile area around each port.

[178] In *Conex* the Board argued that the ILA had abandoned any right to the work in controversy due both to its 1959 agreement with the NYSA, *see* text at notes 46-48 *supra*, and to the period of time between the advent of containerization and attempts by the ILA, through the Rules, to secure the work. Even though the Second Circuit affirmed the Board, it disavowed this point's validity. 537 F.2d at 712.

The Board apparently does not rely on this abandonment point in the instant cases, but Chairman Fanning used the point to justify the fact that he dissented in the Baltimore-Hampton Roads case and concurred in the New York case. In our view the abandonment point is without merit. We break no new ground when we characterize collective bargaining as "a constant and unending dialogue of powers." O. KAHN-FREUND, LABOUR AND THE LAW 15 (2d ed. 1977). As in any dialogue, the most appropriate response cannot always be framed instantaneously. Rather, ideas generally develop over time; the best ideas may indeed require the longest gestation periods. Be that as it may, the crucial point here is that the dialogue over how best to assimilate containerization—and, more particularly, the work of stuffing and stripping containers in the port area—into traditional longshore work patterns has never ceased. As Part I of this opinion demonstrates, the issue of containerization has been a key ingredient in ILA-shipper relations from the moment of its inception to the present.

2. *Whose labor relations?*

National Woodwork instructed us, and *Pipefitters* reinstructed us, that to be classified as work preservation a boycott must be focused on the "labor relations of the contracting employer *vis-à-vis* his own employees."[179]

Further, the abandonment point ignores the possibility of recapturing work that, due to technological innovation or managerial initiative, has temporarily escaped from the bargaining unit. *Compare* Note, *Work Recapture Agreements and Secondary Boycotts*, 90 HARV. L. REV. 815 (1977) (arguing for an intermediate category of "work recapture" between the categories of "work preservation" and "work acquisition"), *with Meat & Highway Drivers, Dockmen, etc., Local 710 v. NLRB*, 335 F.2d 709, 714 (D.C. Cir. 1964) ("Moreover, in the case before us, we have not work acquisition but work recapture.").

A variation on the abandonment theme is offered by intervenor Houff Transfer, Inc. in the Baltimore and Hampton Roads case. Houff argues that the negotiation of the royalty payment provision in the Rules represents a conscious choice on the part of the ILA to accept that payment instead of the work of stuffing and stripping FSL containers. Intervenor's brief at 26 *et seq.* The argument is plausible only to the extent that abandonment took place with respect to FSL containers that go directly to their beneficial owners or to a point outside a 50-mile radius of the ports for stripping. The ILA has consistently proven antagonistic to the idea that any containers can be stripped or stuffed in the port area by other than ILA labor. This hardly amounts to abandonment, the royalty payment notwithstanding. For a case where abandonment may have taken place, *see International Longshoremen's & Warehousemen's Union*, 208 N.L.R.B. 994 (1974), *aff'd (mem.)*, 515 F.2d 1018 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 942 (1976).

[179] 386 U.S. at 645; *see* 429 U.S. at 511, 528.

The boycott must not be "tactically calculated to satisfy union objectives elsewhere." [180]

Ever since containerized shipping was first introduced in New York, Baltimore, and Hampton Roads, it has been a hotly debated item between shippers and their associations (CONASA, NYSA, STAB, HRSA, etc.), on the one hand, and the ILA on the other.[181] Indeed, containerization bears primary responsibility for months of work stoppages by ILA members infuriated by actions of shippers with respect to containerization.[182] The Rules on Containers and activities seeking to enforce the Rules are directly traceable to the collective bargaining relationship between the shippers and the ILA and to the efforts of the parties, within the confines of that relationship, to adjust to an extremely thorny industrial issue: technological innovation versus job security. Nowhere has it been established, or even intimated, that the ILA, perhaps with a view to organization, was attempting to focus its boycott on the labor relations of the trucking companies and the consolidators.[183] Those employers were affected by the boycott, to be sure, as were their employees. But we must distinguish between the incidental effects of primary activity, on the one hand, and a secondary purpose on the other. The former are allowable under the national labor laws,[184] and there has been no

[180] 386 U.S. at 644; *see* 429 U.S. at 511, 528.

[181] *See* Part I *supra*.

[182] *Id.*

[183] Thus the First Circuit's observation to this effect in *International Longshoremen's Ass'n v. NLRB*, 560 F.2d 439, 445 (1st Cir. 1977), is inapposite here.

[184] *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 627 (1967) ("however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective"). Courts of Appeals have consistently followed the rule that a valid work preservation clause does not become illegal because it has a serious impact upon third parties. *See, e.g., Local 742, United Brhd of Carpenters v. NLRB*, 444 F.2d 895, 901 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971); *American Boiler Manufacturers Ass'n v. NLRB*, 404 F.2d 547, 552 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970); *NLRB v. Local 28, Sheet Metal Wkrs International Ass'n*, 380 F.2d 827, 830 (2d Cir. 1967).

convincing showing by the NLRB that the latter exists. The challenged boycott unquestionably focused on the "labor relations of the contracting employer *vis-à-vis* his own employees." [185]

3. *The effect of the Rules on the legality of union activity*

Under *Pipefitters* a work preservation agreement does not itself immunize secondary activity from the effects of the congressional proscription of secondary boycotts.[186] Neither the NLRB nor this court relies on this thesis, hence this issue is not raised.

4. *The right to control test*

In *Pipefitters* the Supreme Court resolved a dispute among the circuits by affirming the validity of the Board's right to control test as a means of delineating primary activity.[187] Under this test an employer subjected to an

[185] 386 U.S. at 645.

[186] 429 U.S. at 514-521.

[187] Four circuits had rejected the right to control test as a departure from *National Woodwork*'s instruction to consider "all the surrounding circumstances." 386 U.S. at 644. *See Local 636, United Ass'n of Journeymen v. NLRB*, 430 F.2d 906 (D.C. Cir. 1970); *Beacon Castle Square Building Corp. v. NLRB*, 406 F.2d 188 (4th Cir. 1969) (dictum); *American Boiler Manufacturers Ass'n v. NLRB*, 404 F.2d 556 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970); *NLRB v. Local 164, International Brhd of Electrical Wkrs*, 388 F.2d 105 (3d Cir. 1968). The Fourth and Ninth Circuits accepted the test's

industrial sanction by his employees must be able to control the disposition of the work sought by those employees for their activity to be considered primary.[188] The Court held that this test was an acceptable gloss on the congressional proscription of secondary boycotts.[189]

Ironically, after defending use of this test in circuit after circuit and finally vindicating its use in the highest court in the land, the NLRB's posture in the cases before us is not supported by rational application of the right to control test. CONASA and NYSA shippers—the employers of the boycotting ILA members in these cases, and the coerced employers under *Pipefitters*—controlled the disposition of all the containers at issue.[190] Indeed, according to the Board the Rules reach no containers except those owned or leased by the shippers.[191] Thus

validity. *Associated General Contractors, Inc. v. NLRB*, 514 F.2d 433 (9th Cir. 1975); *George Koch Sons, Inc. v. NLRB*, 490 F.2d 323 (4th Cir. 1973).

[188] 429 U.S. at 521.

[189] *Id.* at 514-521.

[190] The Board notes that the Equipment Interchange Agreement used by United States Lines granted truckers "control" over containers in their "custody and possession." 231 N.L.R.B. at 361, 365. As these cases amply demonstrate, however, and as the NLRB itself recognizes, 231 N.L.R.B. at 362-363; 98 L.R.R.M. at 1277, the shipper's power of disposal over the containers is not thereby impaired, as the shipper can simply refuse to release a container to a trucking company or consolidator. We also find this point dispositive of the Board's contentions with respect to the right of consolidators and trucking companies to control the cargo inside the containers. Unless the shippers turn over the containers, as they ultimately chose not to do in the cases before us, this "right" is without substance.

[191] 98 L.R.R.M. at 1277 ("Briefly, these Rules require that *any containers owned or leased* by employer-members [of CONASA] * * *." (emphasis added)). *See* JA(B-HR) 415a. This observation of the NLRB appears to be in conflict both

when the relevant Container Committees found the shippers in violation of the Rules and fined them, the shippers, after unsuccessfully seeking indemnification from the truckers and consolidators, simply refused to supply their containers to the truckers and consolidators so that the Rules would be complied with—that is, so that ILA labor would do the work if the work were to be done. It is difficult to imagine a more forceful demonstration of control.[192]

5. *The substantial evidence standard*

The *Pipefitters* Court made abundantly clear that, under the NLRA,[193] courts reviewing NLRB decisions are bound by the Board's factual findings if supported by substantial evidence on the record considered as a whole.[194] But the salient facts underlying the cases before us are not in dispute. This is the fourth circuit to adjudge the validity of the Rules on Containers or of action seeking to enforce the Rules, and the factual backgrounds of

with the terms of the 1974 Rules, *see* Rule 1(a)(1), *reprinted in* Appendix B *infra*, and with its earlier determination in *Conex*, *see* 221 N.L.R.B. at 960. Containers "used" by CONASA shippers also come under the Rules. The important points here, however, are that petitioners' contentions that the shippers owned or leased the containers at issue are unrefuted and that, in any event, the shippers clearly had "control" over the disposition of the containers.

[192] Thus, in light both of our preceding discussion on the proper formulation of the work in controversy, *see* text at notes 163-178 *supra*, and of the shippers' control over disposition of containers, the Supreme Court's following characterization in *Pipefitters* is inapplicable to the instant cases: "the union sought to acquire work that it never had and that its employer had no power to give it * * *." 429 U.S. at 530 n.16.

[193] 29 U.S.C. § 160(e) (1976).

[194] 429 U.S. at 530-531.

these cases overlap to a significant degree.[195] As the NLRB forthrightly observed with respect to the instant case arising in Baltimore and Hampton Roads, "[P]etitioners' real complaint is with the Board's analytic framework not its findings of fact," [196] a characterization in which the petitioners heartily concur.[197] And as to the New York case, the Board commented that its

> decision in Conex is controlling. The Conex case involved the identical Respondents [NYSA and ILA] and dealt with the same Rules on Containers. The charging parties in Conex were also consolidating companies engaged in off-pier stripping and stuffing of containers. * * * [198]

In *Conex* Judge Wyzanski, who wrote the majority opinion affirming the NLRB, stated that "[t]here is no dispute as to the objective facts in this case." [199]

Like the petitioners and the other circuits, this court has no dispute with the Board's factual findings. Rather, our conflict with the NLRB is exclusively focused on the Board's misinterpretation and misapplication of the prevailing law—the doctrine of work preservation.[200] The Supreme Court has consistently maintained that NLRB rulings should not be sustained by reviewing courts where

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[195] *See* text at notes 133-159 *supra*. Also, the District Court's decision in *Consolidated Express, Inc. v. New York Shipping Ass'n*, 452 F.Supp. 1024 (D. N.J. 1977), has been the subject of an interlocutory appeal to the Third Circuit, —— F.2d —— (3d Cir. Nos. 78-1529 & 78-1530, decided April 16, 1979), *aff'g in part & rev'g in part* 452 F.Supp 1024.

[196] Respondent's brief (B-HR) at 34 n.20.

[197] *See, e.g.*, petitioner's (CONASA) reply brief (B-HR) at 2.

[198] 98 L.R.R.M. at 1277.

[199] 537 F.2d at 708.

[200] *See* text at notes 105-132 *supra*.

those rulings rest on "erroneous legal foundations." [201] The NLRB's decisions before us are of such a character, and thus reversal is warranted.[202]

III. Conclusion: Containerization and the National Labor Policy

The relationship between the ILA and CONASA shippers has been under continual strain over the past two decades due to containerization.[203] Their relationship has survived prolonged negotiations, presidential intervention, and the occasional use of economic force.[204] The result

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[201] *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *see NLRB v. Brown*, 380 U.S. 278, 290-292 (1965).

[202] In Nos. 77-1735 and 77-1758 intervenor Houff Transfer, Inc. maintains that, because these cases focus on FSL containers while *Conex* (and No. 78-1510) focuses on CFCL, LTL, and LCL containers, the respective factual backgrounds are distinguishable. Intervenor's brief at 37-40. However, because we find that the Board committed an error of law in both the New York and the Baltimore-Hampton Roads cases, Houff's argument is not relevant.

[203] *See* Part I *supra*.

[204] *Id.* It hardly requires mention that use of economic force in collective bargaining is fully within the contemplation of the national labor laws. In *NLRB v. Insurance Agents International Union*, 361 U.S. 477, 489 (1960), the Supreme Court stated, "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *See NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287 (1972) ("Preventing industrial strife is an important aim of federal labor legislation, but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal. When a bargaining impasse is reached, strikes and lockouts may occur."); *Air Line Pilots Ass'n International v. CAB*, 502 F.2d 453, 456 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) (national labor policy rests upon the principle that parties are free to marshal economic resources in resolution of labor disputes, consistent with the rights and prohibitions of labor statutes).

of their efforts is the Rules on Containers. These Rules represent a reasoned response to the difficult problem of technological innovation and are an exemplar of the self-government contemplated by Congress when it left the bulk of industrial problems to be resolved in the private sector.[205] The Rules seek neither to stymie technological innovation nor to introduce manual labor in situations where the work otherwise would be handled by more efficient mechanized means;[206] rather, the Rules intend to secure for ILA labor any stripping and stuffing of containers that is to be performed within 50 miles of port by other than the employees of the cargo's beneficial owner. Courts and the NLRB must take great care not to disturb the parties' reasoned attempts at self-governance unless those attempts contravene the law. For the reasons stated in this opinion, we believe that the NLRB has failed to demonstrate that the Rules on Containers and action seeking to enforce the Rules are in contravention of the law. Accordingly, the NLRB's decisions in these cases are vacated, and its cross-applications for enforcement are denied. We remand to the NLRB for any further proceedings it deems appropriate.

So ordered.

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[205] *See generally* Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

[206] Containers that were not stuffed and stripped in compliance with the Rules, however, have been, and doubtless in the future will be, subjected to duplicate stuffing and stripping by ILA labor. Consider one commentator's characterization of ILA behavior that in the past has slowed the rate of innovation:

> There is reason to believe, or at the very least the question must remain open, that the optimum rate in which labor-saving technology is introduced is not the fastest possible rate. To the extent that this is true, union impediments may be considered as not merely obstacles to progress, but as efforts to buy time in which the human costs of change can be softened and made more tolerable.

Ross, *supra* note 7, 21 LAB. L. J. at 419.

APPENDIX A

1968 Hampton Roads Rules on Containers

I. CONTAINERIZATION

Containers owned or leased by Employer-signatory members (including containers on wheels) containing LTL loads or consolidated full-container loads, which are destined for or come from, any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo, and which either comes from or is destined to any point within a 50-mile radius from the center of any North Atlantic District port shall be stuffed and stripped by ILA longshore labor at longshore rates on a waterfront facility under the terms and conditions of the General Cargo Agreement. (Rules on Containers are listed below.)

II. RULES ON CONTAINERS

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts at deepsea piers or terminals. To assure compliance with the collective bargaining provisions the following rules and regulations shall be applied.

A. Definitions and Rule as to Containers Covered

Stuffing—means the act of placing cargo into a container

Stripping—means the act of removing cargo from a container

Loading—means the act of placing containers aboard a vessel

Discharging—means the act of removing containers from a vessel.

These provisions relate solely to containers meeting each and all of the following criteria:

1. Containers owned or leased by employer-signatory members (including containers on wheels) which contain LTL loads or consolidated full container loads.

2. Such containers which come from or go to any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

3. Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle within its radius extending out from the center of each port. It is understood that the center of Hampton Roads will be defined as Middle Ground Light.

B. Rule of Stripping and Stuffing Applied to Such Containers

A container which comes within each and all of the criteria set forth in "A" above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container of cargo shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LTL loads or consolidated container loads of mail, of household goods with no other type of cargo in the container, and of personal effects of military personnel shall be exempt from the rule of stripping and stuffing.

C. Rules on No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply.

1. Agreement in the Port as to the geographic area as provided in "A (3)" is based on present LTL movement patterns in the port. Should any person, firm or corporation, for the purpose of evading the provisions of "B" hereof, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside agreed-upon geographic area, then either party may raise the question whether said point should be included within the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of "B", then said point shall be deemed to be within the said geographic area for the purpose of these rules.

2. Containers owned or leased by companies which are affiliated either directly or through a holding company with an employer-member shall be deemed to be containers owned or leased by employer-members. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the employer-member, its parent, or stockholders of either of them.

3. It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is an "A" container which is to be stuffed and stripped at the waterfront facility (pier or dock).

4. Each employer-member shall keep records of each container supplied to a consolidator or other non-owner of cargo, located within the agreed geographic area, and such record shall be available to the Committee provided in (7) below. With respect to all containers received at

or delivered from the vessel, a record of the same shall be made by ILA Checkers or Clerks.

5. Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of "B" shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules then the steamship carrier found guilty of intent to cause improper, fictitious, or incorrect documentation to evade the provisions of "B" above shall pay to the joint Welfare Fund $150.00 per container which should have been stuffed or stripped.

6. If any shippers or their agents who have at any time used, are now using, or in the future use containers owned or leased by employer-members, hereafter use containers not owned or leased by employer-members, for the purpose of evading the provisions of "B" hereof, then the containers so used shall be considered to be within "A" and "B".

7. A committee represented equally by management and Union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by "C (8)" hereof.

8. If the purpose of protecting and preserving the present work jurisdiction of longshoremen and all other deepsea ILA crafts over any containers loaded with LTL cargo, or consolidated full container loads as defined herein is not accomplished by the provisions of these rules on containers, then either party shall have the right to renegotiate these provisions or any part thereof by giving notice to the other party. This provision shall

not be subject to arbitration. Pending renegotiation and settlement of the given dispute, the employees may decline to work the specific containers involved in the dispute and such refusal to work shall not be subject to arbitration. The renegotiation referred to above will not be subject to arbitration. Interpretation of this provision shall not be determined by an arbitrator but by a court of competent jurisdiction.

APPENDIX B

1974 Rules on Containers

CONASA-ILA RULES ON CONTAINERS

PREAMBLE

This Agreement made and entered into by and between the carrier and direct employer members of the CONASA Port Associations (hereinafter referred to collectively as "CONASA") and the International Longshoremen's Association, AFL-CIO ("ILA"), its Atlantic Coast District ("ACD") and its affiliated local unions in each CONASA port ("locals") covers all container work at a waterfront facility which includes but is not limited to the receiving and delivery of cargo, the loading and discharging of said cargo into and out of containers, the maintenance of containers, and the loading and discharging of containers on and off ships.

CONASA agrees that it will not directly perform work done on a container waterfront facility (as hereinafter defined) or contract out such work which historically and regularly has been & currently is performed by employees covered by CONASA-ILA Agreements, including CONASA-ILA craft agreements, unless such work on such container waterfront facility is performed by employees covered by CONASA-ILA Agreements.

RULES

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts which was performed at deepsea waterfront facilities. These rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea ILA labor. To assure compliance

with the collective bargaining provisions, the following rules and regulations shall be applied uniformly in all CONASA Ports to all import or export cargo in containers:

Definitions

(a) Loading a Container—means the act of placing cargo into a container.

(b) Discharging a Container—means the act of removing cargo from a container.

(c) Loading Containers on a vessel—means the act of placing containers aboard a vessel.

(d) Discharging Containers from a vessel—means the act of removing containers from a vessel.

(e) Waterfront facility—means a pier or dock where vessels are normally worked including a container compound operated by a carrier or direct employer.

(f) Qualified Shipper—means the manufacturer or seller having a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the export cargo being transported and who is named in the dock/cargo receipt.

(g) Qualified Consignee—Means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.

(h) Consolidated Container Load—means a container load of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.

Rule 1—Containers To Be Loaded or Discharged by Deepsea ILA Labor

(a) Cargo in containers referred to below shall be loaded into or discharged out of containers only at a waterfront facility by deepsea ILA labor:

(1) Containers owned, leased or used by carriers (including containers on wheels and trailers), hereinafter "containers", which contain consolidated container loads, which come from or go to any point within a geographic area of any CONASA port described by a 50-mile circle with its radius extending out from the center of each port. (hereinafter "geographic area") or

(2) Containers which come from a single shipper which is not the manufacturer ("manufacturer's label") into which the cargo has been loaded (consolidated) by other than its own employees and such containers come from any point within the "geographic area," or

(3) Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the "geographic area" and which is not warehoused in accordance with Rule 2(B).

(b) Such ILA labor shall be paid and employed at deep-sea longshore rates under the terms and conditions of the deep-sea ILA labor agreement in each CONASA port, including the provisions for all fringe benefits and any and all other benefits receivable by deep-sea ILA craft workers in each such Port. No cargo shall be loaded into or discharged out of any container by ILA deep-sea labor more than once.

(c) All export consolidated cargo, described in 1(a) (1) and (2) above, shall be received at the waterfront facility by deep-sea ILA labor and such cargo shall be loaded into a container at the waterfront facility for loading aboard ship.

(d) All import consolidated cargo, described in 1(a) (1) and (3) above, shall be discharged from the container and the cargo placed on the waterfront facility where it will be delivered and picked up by each consignee.

(e) No carrier or direct employee shall supply its containers to any consolidator or de-consolidator. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all Rule 1 Containers be loaded or discharged at a waterfront facility.

Rule 2—Containers Not to be Loaded or Discharged by ILA Labor

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A. Export Cargo:

(1) All cargo loaded in containers outside the "geographic area".

(2) Containers loaded with cargo at a qualified shipper's facility with its own employees.

(3) Containers loaded with the cargo of a single manufacturer (manufacturer's label).

(4) Consolidated container loads of mail, household effects of a person who is relocating his place of residence, with no other type of cargo in the container, or personal effects of military personnel.

B. Import Cargo;

(1) All cargo discharged from containers outside the "geographic area".

(2) Containers discharged at a qualified consignee's facility by its own employees.

(3) Consolidated container loads of mail, household effects of a person who is relocating his place of business, with no other type of cargo in the container, or personal effects of military personnel.

(4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions.

1. The container cargo is warehoused at a bona fide public warehouse.

2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days, and;

3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.

The carrier on request will furnish all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1. It is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a consolidator or de-consolidator.

Rule 3—Batching

When an employer-member or carrier uses a trucker to remove or deliver containers in batches, or in substantial number, from or to a terminal to another place of rest (outside of its terminal) where containers are stored pending their delivery to a consignee (or after being received from a shipper and while waiting the arrival of a ship), for the purpose of reducing the work jurisdiction of the ILA or any of its crafts, such use is deemed to be batching and an evasion of these Rules in violation of the CONASA-ILA contract.

Rule 4—Headload

Where a single qualified shipper sends an export container which contains all of his own cargo to a waterfront facility and such container is not full, the carrier or direct employer may load this container with additional cargo at the waterfront facility. On import cargo, the carrier or direct employer may discharge any such additional cargo and send the remaining cargo in the container to the qualified consignee. The loading or discharging of cargo at ILA ports shall be performed at a waterfront facility by deepsea ILA labor.

Rule 5—Overland Movement of Containers from CONASA Port to Non-CONASA Port

If a carrier moves containers from a CONASA Port to a non-CONASA Port for the purpose of evading the Rules on Containers, the carrier is in violation of the CONASA-ILA Agreement. If the cargo is being moved to a non-CONASA-ILA Port in the normal course of business, and not for the purpose of evasion, then such movement is not a violation.

Rule 6—Importers Advertising Evasion of Rules

The circulation, in writing, by importers, of methods developed by them to evade the Rules on Containers by issuing single bills of lading on what are in fact consolidated container loads shall be deemed a violation and all CONASA-ILA Container Committees shall be advised to stop such evasion at the waterfront facilities.

Rule 7—No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply:

(a) Geographic Area—Agreement in the Port to the geographic area as provided in Rule 1 is based on present consolidated movement patterns in the port. Should any person, firm or corporation for the purpose of evading the provisions of the Rules on Containers, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside said agreed upon geographic area, then either party may raise the question whether said point should be included within the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of the Rules on Containers, then said point shall be deemed to be within the said geographic area for the purpose of these rules.

(b) Containers Owned, Leased or Used

Containers owned, leased or used by companies which are affiliated either directly or through a holding company with a carrier or a direct employer shall be deemed to be containers owned, leased or used by a carrier or direct employer. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the carrier or direct employer, its parent, or stockholders of either of them.

(c) Liquidated Damages—Failure to load or discharge a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 1 and Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been loaded or discharged under the Rules, then the carrier or its agent or direct employer shall pay, to the joint Container Royalty Fund, liquidated damages of $1,000 per container which should have been loaded or discharged. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in Rule 9(a) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

(d) Any facility operated in violation of the Container Rules will not have service supplied to it by any direct employer and the ILA will not supply labor to such facility.

Rule 8—Renegotiation and Cancellation—No Arbitration

These Rules shall be in effect for the term of the CONASA-ILA Agreement, provided, however, that either party shall have the right to cancel the Rules on Containers at any time on or after December 1, 1974, on thirty (30) days written notice of a desire to renegotiate the provisions of these Rules. Negotiations shall be held during such thirty (30) day period and if the parties are unable to agree by the end of such period, these Rules shall be deemed cancelled. Thereafter, the ILA shall have the right to refuse to handle containers and CONASA shall have the right to refuse to hire employees under the said Rules. The negotiations referred to above shall, under no condition, be subject to the grievance or arbitration provisions of any CONASA-ILA Agreement.

Rule 9—Enforcement of the Rules on Containers

To assure effective, fair and non-discriminatory enforcement of the above Rules, the following regulations shall apply:

(a) A Committee in each CONASA port represented equally by management and union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these Rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by Rule 8 hereof. A joint committee, known as the CONASA-ILA Container Committee, represented equally by management and labor and made up of representatives (to be mutually agreed upon)

from each CONASA Port, namely, Boston, Rhode Island, New York, Philadelphia, Baltimore and Hampton Roads shall meet at least quarterly each year for the purpose of insuring uniformity in the interpretation of these Rules.

(b) A Committee of carriers, together with CONASA-ILA Container Committee will develop uniform documentation which shall be required to be prepared and maintained by all carriers in order to readily identify all Rule 1 containers which are subject to loading or discharging by deepsea ILA labor. It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is a Rule 1 container, which shall be loaded or discharged. If a container's documentation is not clearly marked, it shall be deemed a Rule 1 container and it shall be loaded or discharged by deepsea ILA labor at the waterfront facility. With respect to all containers received at or delivered from the waterfront facility, a record of the same shall be made by ILA Checkers or Clerks. All carriers will distribute to all other carriers any and all information and devices which are being used by any person to circumvent the Rules on Containers. Any carrier whose attention is brought to a violation of the Rules shall immediately cease such violation and report the matter to the appropriate CONASA-ILA Container Committee and to the policing agency provided in (e) below in its port.

(c) Every import container destined to a point within 50-miles of a CONASA Port shall be delivered only on a delivery order. Every export container coming from a point within 50-miles of a CONASA Port shall be received only on a dock/cargo receipt. Such delivery orders and dock/cargo receipts shall certify the place of delivery and origin of the container, the name or names of the person to whom the cargo is being delivered and from which it is

shipped, the identity of the owner of the cargo, weight of the cargo, identity of the cargo and the origin and final destination of the container. Copies of such delivery orders and dock/cargo receipts shall be available to the local port Container Committee and the policing agency provided for in (e) below.

(d) The Container Committee in each CONASA Port shall promulgate to all carriers and direct employers, and to the Container Committees in each CONASA Port, any and all interpretations of the Rules on Containers as and when they are made. This will include uniform interpretations as and when they are issued. The CONASA-ILA Container Committee shall also promulgate uniform interpretations to local port Container Committees, as and when they are issued.

(e) Policing Agency—Each CONASA Port shall establish a method of policing and enforcing these Rules on a uniform and non-discriminatory basis. No such method shall be implemented until presented to and approved by the joint CONASA-ILA Container Committee.

Rule 10—Container Royalty Payments

The two Container Royalty payments required by the CONASA-ILA collective bargaining agreements shall be payable only once in the Continental United States. They shall be paid in that ILA Port where the container is first handled by ILA longshore labor at longshore rates. The second container royalty payment (provided by paragraph 6 of the 1971-1974 CONASA-ILA Memorandum of Agreement) shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis. Containers originating at a foreign port which are transshipped at a United States port for ultimate destination to another foreign port ("foreign sea-to-foreign-sea containers") are exempt from the payment of container royalties.

ROBB, *Circuit Judge, dissenting*: The keystone of the majority opinion is the assertion that the Board erred by failing to consider "all the surrounding circumstances", and in particular by ignoring the "traditional work patterns" of longshoremen. Proper consideration of the "relevant work patterns", says the majority, "would have led to a different categorization for the work in controversy." I do not agree. In my judgment the Board gave proper consideration to the surrounding circumstances, including the traditional work patterns of longshoremen; and I think the Board reached the right result.

In the Baltimore—Hampton Roads case, 231 N.L.R.B. 351 (1972) the Board affirmed the finding of the Administrative Law Judge that

> [T]he history of the longeshoremen's work tradition in Baltimore and Hampton Roads shows that their role in handling break-bulk import cargo ended at the head of the pier, where an ILA freight handler picked up the cargo and loaded it onto a truck. Thereafter, the fate of that cargo was the responsibility of the motor carrier, as set forth in the bill of lading.
>
> The advent of containerization in the ports of Baltimore and Hampton Roads did not change the traditional role of the ILA longshoremen. The motor carriers have treated import shippers' loads destined for consignees located more than 50 miles from the center of the port of entry much as they did break-bulk cargo. For, with very rare exceptions, motor carriers have freely picked up the steamship company's containers mounted on wheeled trailers and hauled them to the consignee in accordance with the bills of lading. The motor carriers have also traditionally hauled such containers to their own truck terminals and have stripped the shippers' loads from them and are loaded into their own trailers, using truck terminal employees, whenever considerations

> of state regulation, safety, or economy persuaded a motor carrier to take that precaution.

Id. at 365.

In the New York case the Board held that "traditionally the off-pier stuffing and stripping of containers was performed by consolidating companies and not longshoremen. Since the work was not traditional longshore work and had never been performed by longshoremen, the Rules which require the shipping companies to stop doing business with consolidators did not have a lawful work-preservation object." (J.A. 66a) The Board referred to *International Longshoremen's Ass'n, (Conex)* 221 N.L.R.B. 956 (1975), *enf'd* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041, *rehear. denied,* 430 U.S. 911 (1977). In the *Conex* case, which the Board in our case held was controlling, the Board found:

> The traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.
>
> Similarly, for many years, maritime cargo has been sorted and consolidated off the docks by companies employing teamsters and unrepresented employees. With the advent of vessels designed exclusively to carry the large containers presently in use, these consolidating companies, such as Consolidated and Twin, have continued to consolidate shipments into containers prior to their placement aboard the vessels. The consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship. Furthermore, they perform this consolidation work at their own off-pier premises, with their own employees who are outside the unit represented by ILA, and who fall within the coverage of separate collective-bargaining agreements, under which they are represented by

> other labor organizations. It is clear, therefore, that Consolidated and Twin have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy.
>
> From the foregoing and the record as a whole, it is clear that the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises. It does not fall within ILA's traditional role to engage in make-work measures by insisting upon stripping and stuffing cargo merely because that cargo was originally containerized by nonunit personnel. Yet, ILA's demands here could only be met if the work traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA.

Id. at 959-60. [Footnote omitted]

There is substantial evidence in the records of both the Baltimore—Hampton Roads case and the New York case to support the Board's finding that the traditional work of longshoremen does not include the work traditionally performed by motor carriers in stripping and stuffing containers. As the Board said the traditional work of longshoremen has been to load and unload ships, and there is substantial evidence that traditionally longshoremen have not stuffed and stripped containers on the pier or elsewhere. Any stuffing or stripping by longshoremen has been only incidental.

I am not impressed by the fiction that a container is part of the hold of a ship; if it is, then so is any large box in the hold of a ship. Nor am I persuaded by the "similarities" which the majority perceive between the work of loading and unloading ships and the work of filling and emptying containers. The question is not

whether there may be similarities in the work entailed in the two operations. Rather, the question is, who traditionally has done that work.

In my opinion the longshoremen are attempting to acquire work they have never had, therefore the defense of work preservation must be rejected. My conclusion is fortified by the decisions of three circuit courts of appeals. *International Longshoremen's Ass'n v. NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041, *rehear. denied*, 430 U.S. 911 (1977); *International Longshoremen's Ass'n Local 1575 v. NLRB*, 560 F.2d 439 (1st Cir. 1977); *Humphrey v. International Longshoremen's Ass'n*, 548 F.2d 494, 499-500 (4th Cir. 1977); *see International Longshoremen's & Warehousemen's Union Local 13*, 208 N.L.R.B. 994 (1974), which this court enforced *per curiam* without an opinion, 169 U.S. App. D.C. 300, 515 F.2d 1017 (1975), *cert. denied*, 424 U.S. 942 (1976).

I would deny the petitions for review and enforce the Board's orders.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-1902
78-1905

Nos.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN W. McGRATH CORP.; PITTSTON STEVEDORING CORP.; and UNIVERSAL MARITIME SERVICE, CORP.,

Petitioners,

v.

CONSOLIDATED EXPRESS, INC. and TWIN EXPRESS, INC.,

Respondents.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

CONSOLIDATED EXPRESS, INC. and TWIN EXPRESS, INC.,

Respondents.

APPENDIX TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-1529

CONSOLIDATED EXPRESS, INC.,

Appellant,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICES, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.

(D.C. CIVIL No. 76-1645)

No. 78-1530

TWIN EXPRESS, INC.,

Appellant,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.

(D.C. CIVIL No. 77-156)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued November 14, 1978

Before SEITZ, *Chief Judge,* GIBBONS and WEIS, *Circuit Judges*

(Opinion filed April 16, 1979, as amended May 18, 1979)

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Opinion of the Court

GIBBONS, *Circuit Judge:*

We here review an order denying plaintiffs' motion for partial summary judgment on issues of liability in a suit pleading causes of action under § 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187, and § 4 of the Clayton Act, 15 U.S.C. § 15. The order is before us on an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The district court identified four controlling questions of law which in its view were worthy of interlocutory review, and a panel of this court granted leave to appeal. Before this court the parties have addressed those questions as well as other considerations which are urged in support of and in opposition to the district court's ruling. We reverse the court's order denying summary judgment on the § 303(b) claim. Because we conclude that material issues of fact may remain regarding the availability of the non-statutory labor exemption to the antitrust laws we affirm the denial of summary judgment on the antitrust claim.

I. The Facts

A. The Parties and their Businesses

The plaintiffs are Consolidated Express, Inc. (Conex) and Twin Express, Inc. (Twin). They are non-vessel owning common carriers engaged in the business of consolidating less than container load (LCL) or less than trailer load (LTL) cargo for shipment between Puerto Rico and the Port of New York (the Port). At their off-pier facilities, they pack the shipments of several customers into large containers which are then trucked to pierside facilities and loaded on board ship. The defendant New York Shipping Association (NYSA) is an association of employers who engage in various businesses related to the passage of freight through the Port. On behalf of its members NYSA conducts collective bargaining negotiations and enters into collective bargaining agreements with various labor organizations, including the defendant International Longshoremen's Association, AFL-CIO (ILA), a labor organization representing longshoremen in the Port. Defendants International Terminal Operating Co., Inc., John M. McGrath Corp., Pittston Stevedoring Corp., United Terminals Corp., and Universal Maritime Services Corp. (the stevedores) are members of NYSA and em-

ployers of ILA longshoremen. They provide stevedoring services to vessels in the Port. Defendants Sea-Land Service, Inc. and Seatrain Lines, Inc. (the vessel owners) are operators of vessels engaged in common carriage by water between the Port and Puerto Rico. Their vessels are designed for the accommodation of large containers. As a part of their business they furnish shippers with containers and trailers for use on board their ships, as well as terminal facilities. They also provide stevedoring services for cargo shipped on their vessels, and thus, like the stevedores, employ ILA longshoremen.

B. Pre-litigation History

Until shortly after World War II most dry cargo was crated by the shipper, delivered to the pier by rail or truck, and loaded into a vessel piece-by-piece by longshoremen. That method of cargo handling has now generally been replaced by the use of vessels specially designed to accommodate mammoth containers. The cargo of large volume shippers may fill one or more containers. That of lower volume shippers is consolidated with the cargo of others in a single container. Many of these containers, when removed from the vessel, serve as semi-trailers, and virtually all are readily shipped by truck. Thus they can be loaded or unloaded ("stuffed" or "stripped" in longshoreman parlance) at sites remote from the pier. This innovation has increased productivity in the movement of cargo by water, but has produced a decline in the demand for longshoreman labor.

When in 1958 ILA struck the members of NYSA, a central issue was the growing use of containers on the docks. The strike was not, however, successful in prohibiting their use, and in the ILA-NYSA contract adopted in 1959 ILA conceded that "any employer shall have the right to use any and all types of containers without re-

strictions." In the next decade fully containerized ships were introduced, and dockside work opportunities for ILA members declined still further. These developments led ILA to negotiate with NYSA, as a part of its 1969 collective bargaining agreement, the Rules on Containers (Rules). The Rules dealt specifically with the consolidation of LCL and LTL cargo. NYSA agreed that all consolidated LCL and LTL cargo lots originating from or to be shipped to a point within fifty miles of the dock would be stripped by longshoremen at dockside. Outbound cargo was to be restuffed into a container, while inbound cargo was to be left on the pier for pickup by the consignees. The Rules provided for a penalty against the employer of $250 for every such container which passed through the dockside without being stripped and stuffed. In 1970 the penalty was increased to $1000 per violation.

Shortly after the 1969 Rules became effective Intercontinental Container Transportation Corp. (ICTC), a consolidator with a business similar to that of Conex and Twin, brought an action in the Southern District of New York seeking injunctive relief and damages from NYSA and ILA on the ground that the Rules violated the Sherman Act. At the same time ICTC filed unfair labor practice charges before the NLRB. In the antitrust action, then District Judge Mansfield granted a preliminary injunction prohibiting the defendants from refusing to handle containers stuffed or stripped by the plaintiff. On appeal from that interlocutory order the Second Circuit reversed, holding that there was little likelihood of ultimate success on the merits, because the collective bargaining agreement of which the Rules were a part probably fell within the labor exemption to the antitrust laws. *Intercontinental Container Transp. Corp. v. New York Shipping Ass'n,* 426 F.2d 884 (2d Cir. 1970) (*ICTC*). In ICTC's unfair labor practice case, the Regional Director refused to issue a com-

plaint on the ground that the Rules on Containers were a valid work preservation agreement, and the General Counsel denied the appeal. Joint App. 303a-305a.

The Rules on Containers were carried forward in the 1971-1974 collective bargaining agreement negotiated between ILA and the Council of North Atlantic Shipping Associations (CONASA), an employer bargaining unit composed of NYSA and employer associations in five other North Atlantic ports. But for reasons that are in dispute, the Rules were not consistently enforced. Conex and Twin were therefore able to continue in the business of consolidating LCL and LTL lots, using containers furnished by the vessel owners. Access to such containers was essential to the business of the consolidators, since the vessel owners' ships could carry only specially designed containers, and since prior to October, 1974, Sea-Land and Seatrain were two of only three container carriers operating between the Port and Puerto Rico.[1]

The failure to enforce the Rules led to attempts to improve their effectiveness. On January 25-29, 1973, representatives of CONASA, acting for the employers it represented, met with representatives of ILA in Dublin, Ireland. There those parties negotiated and executed Interpretive Bulletin No. 1, generally known as the Dublin Supplement. The Dublin Supplement established new mechanisms for the enforcement of the Rules against consolidators. It provided that off-pier consolidators operating within fifty miles of the Port were to be considered as operating in violation of the Rules. Consolidators could not avoid application of the Rules by relocating their facilities beyond the fifty mile limit, because the agreement contained a so-called "evasion" or "runaway shop" provision. The Supplement also provided for the establishment and circulation

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[1] The third shipper, Transamerica Trailer Transport, Inc. (TTT), is not a defendant in this action.

to all carriers and stevedores of a list of such violators, and vessel owners were to be fined $1000 for each container furnished to them. The Dublin Supplement was to be policed by a joint ILA-NYSA Container Committee.

In February, 1973, the vessel owners, using ILA labor, commenced stripping and restuffing outbound LCL and LTL containers which had already been stuffed by employees of Conex and Twin at their off-pier facilities and trucked to the pier for shipment to Puerto Rico. Beginning in March, 1973, the three vessel owners operating in the Puerto Rican trade refused to furnish Conex and Twin with empty containers. On April 13, 1973, NYSA and ILA issued a joint statement to NYSA members, naming fourteen consolidators, including Conex and Twin, as operating in violation of the Rules. The notice activated the provision in the Dublin Supplement requiring all NYSA members to refuse containers to the listed companies. These actions had the effect of terminating the plaintiffs' business of freight consolidation for the New York-Puerto Rico trade.

On June 1, 1973, Conex, faced with the destruction of its business, filed charges with the National Labor Relations Board (NLRB). It alleged that by agreeing to the Rules and Dublin Supplement NYSA and ILA had violated § 8(e)[2] of the Labor Management Relations Act (LMRA), and that by seeking to enforce that agreement ILA had violated § 8(b)(4)(ii)(B) of the Act.[3] Thereafter the General Counsel of the NLRB, acting pursuant to § 10(*l*) of the Act, 28 U.S.C. § 160(*l*), filed a complaint against ILA in the United States District Court for the

[2] 29 U.S.C. § 158(e). This section prohibits labor agreements by virtue of which an employer ceases to deal with another employer.

[3] 29 U.S.C. § 158(b)(4)(ii)(B). This section forbids coercion the object of which is to force any employer to cease doing business with another employer.

District of New Jersey seeking preliminary injunctive relief pending final dispositon of those charges by the Board. Judge Lacey conducted a hearing on the § 10(*l*) application at which an extensive record was compiled respecting the Rules, the Dublin Supplement, and their effect upon the business of Conex. In that hearing the General Counsel contended that the Conex containers had not historically been stripped and restuffed at the docks by longshoremen, and thus that the activity of which Conex complained was secondary, without a work preservation justification, and in violation of §§ 8(b)(4)(ii)(B) and 8(e). ILA made the opposite contention, and testimony was presented on the issue so drawn. The district court concluded that the General Counsel's theory was substantial and not frivolous. It therefore enjoined enforcement of the Rules against Conex, the charging party. *Balicer v. International Longshoremen's Ass'n,* 364 F. Supp. 205 (D. N.J. 1973), *aff'd,* 491 F.2d 748 (3d Cir. 1973). Following a separate hearing on substantially identical charges filed with the NLRB by Twin, the General Counsel later obtained a § 10(*l*) injunction prohibiting enforcement of the Rules against it. *Balicer v. International Longshoremen's Ass'n,* 86 L.R.R.M. 2559 (D. N.J. 1974).

Before the NLRB the Conex and Twin charges were consolidated for hearing. The parties stipulated that the record made before Judge Lacey in the § 10(*l*) case, as supplemented by affidavits submitted by intervenor International Brotherhood of Teamsters, Local 807, which represents Conex employees, and by additional affidavits submitted by ILA and NYSA, would constitute the record for the unfair labor practice proceedings. On the basis of that record an Administrative Law Judge found that the Rules and Dublin Supplement, and the resulting boycott of Conex and Twin, were addressed to the labor relations of the NYSA employer-members with their own employees. He therefore concluded that the boycott involved protected

primary activity. The NLRB disagreed. The Board rejected the argument that the agreement was a valid effort by ILA to preserve for its members work which they had historically performed. In the Board's eyes, the "work in controversy" was the stuffing and stripping work performed by LCL and LTL consolidators at their off-pier facilities, not loading and unloading of ships at dockside by longshoremen. Thus the Rules could not be justified as a work preservation agreement, valid under the Supreme Court's interpretation of § 8(e) in *National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612 (1967). Moreover, even if ILA once had a valid claim to the work of stuffing and stripping containers, the Board concluded, that claim had been abandoned in the 1959 ILA-NYSA agreement authorizing the use of container vessels. It therefore held the agreement embodied in the Rules and Dublin Supplement to be a violation of § 8(e) because its object was to force NYSA members to cease doing business with the consolidators. The NLRB also held that ILA's actions in enforcing the agreement were unfair labor practices under § 8(b)(4)(ii)(B). It entered an appropriate cease and desist order on December 4, 1975. *Consolidated Express, Inc.,* 221 N.L.R.B. No. 144 (1975).

NYSA and ILA petitioned for review to the United States Court of Appeals for the Second Circuit. The NLRB cross-petitioned for enforcement. Conex, Twin and Teamsters Local 807 intervened. The Second Circuit held that the Board's conclusion that the work in controversy was that historically performed by employees of the consolidators was supported by substantial evidence, and thus that its analysis of the § 8(b)(4) and § 8(e) issues was sound.[4] It therefore enforced the Board's order and denied

[4] The court announced that it was "not similarly impressed" with the Board's other arguments in support of its position. 537 F.2d at 712.

the NYSA and ILA petitions for review. *International Longshoremen's Ass'n v. NLRB,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041, *reh. denied,* 430 U.S. 911 (1977). A petition for reconsideration and recall of mandate was denied by the Second Circuit on December 16, 1977. A subsequent petition to the NLRB to reopen the unfair labor practice hearing was denied on August 12, 1978.

II. Proceedings in the District Court

Conex and Twin filed substantially identical complaints in the district court, and on April 22, 1977 the two actions were consolidated. In Count I the plaintiffs alleged that the defendants' enforcement of the Rules on Containers and Dublin Supplement constituted a group boycott of the plaintiffs that is *per se* illegal under §§ 1 and 3 of the Sherman Act. 15 U.S.C. § 1, 3 [sic] They sought treble damages pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, for injury to their business or property resulting from that boycott. In Count III plaintiffs alleged that ILA committed unfair labor practices in violation of § 8(b)(4)(ii)(B) of the LMRA, that those violations injured plaintiffs in their business or property, and that ILA was liable for such damages under § 303(b) of the LMRA, 29 U.S.C. § 187(b).[5] A jury trial was demanded. Thereafter Conex and Twin moved for partial summary judgment as to liability on Counts I and III. They contended that the de-

[5] That section provides:

> Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of [section 301] hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

cision of the NLRB, enforced by the Second Circuit, established all facts material to liability issues, and that the defendants were collaterally estopped from attempting to relitigate those issues. Thus, they urged, only the amount of damages remained for trial.

In response to that motion the defendants contended that the judgment in the Second Circuit should have no issue-preclusion effect; that the activities complained of were within the protection of the non-statutory labor exemption to the antitrust laws; that if non-exempt, those activities should be tested by the rule of reason; that there were material issues of fact as to certain defenses; and that the § 303(b) claim was time barred.

The district court, although it accepted the Conex-Twin contentions in several respects, nevertheless denied partial summary judgment on both counts. Recognizing, however, that the order involved controlling questions of law as to which there is a substantial ground for difference of opinion, and that if those questions were decided in plaintiffs' favor partial summary judgment on one or both of the counts in issue might have been proper, the court on February 22, 1978 amended the opinion to include the formal statement required by 28 U.S.C. § 1292(b). The plaintiffs filed a timely notice of appeal, and this court permitted it.

III. Scope of Review

The parties disagree as to what legal issues may be considered on this appeal. Both sides agree that the four questions of law certified by the district court are properly before us.[6]

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[6] These are:

1. Where plaintiff's business is conducted unlawfully, that is, where it operates as a freight forwarder having been refused a license by the Interstate Commerce Commission to so operate, has it suffered injury "in its business" which is compensable in an action under Section 303 of the Labor Management Relations Act?

2. Does the NLRB's finding of an unfair labor practice foreclose consideration of the labor exemptions, statutory or implied, to the antitrust laws?

3. Must the legality of the Rules on Containers be tested against a *per se* rule of antitrust violation?

4. Where plaintiff's business is conducted unlawfully, that is, where it operates as a freight forwarder having been refused a license by the Interstate Commerce Commission to so operate, has it suffered injury to its business which is compensable under the Clayton Act?

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In supporting their motion to strike portions of the appellees' briefs, appellants suggest that since the defendants prevailed in the district court on the motion for summary judgment they may not raise issues of law decided adversely to them, or not decided at all. Absent a cross-appeal, which is unavailable to a prevailing party, they contend that these issues are not properly before this court. The appellees in turn argue that because the district court refused to identify as controlling questions several equitable defenses, those defenses may not be considered in a § 1292(b) appeal. Neither view is correct. In *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974), the court stated the rule governing § 1292(b) interlocutory appeals:

> [O]nce leave to appeal has been granted the court of appeals is not restricted to a decision of the question of law which in the district judge's view was controlling.

496 F.2d at 754. *Accord, Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860, 865 n.2 (3d Cir.) (Seitz, C.J.,

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concurring), *cert. denied,* 431 U.S. 933 (1977); *Johnson v. Alldredge,* 488 F.2d 820 (3d Cir. 1973), *cert. denied,* 419 U.S. 882 (1974). This rule accords with fundamental principles of appellate review. An appeal pursuant to § 1292(b), like any other, is taken from the order of the district court, not from its opinion, and the court is "called upon not to decide the question certified, but to decide an appeal." *Johnson v. Alldredge, supra,* 488 F.2d at 823. When an order or judgment is before a reviewing court, "[t]he prevailing party may . . . assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams,* 397 U.S. 471, 475 n.6 (1970); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 381 n.4 (1970); *see* Note, *Federal Jurisdiction and Procedure—Review of Errors at the Instance of a Non-Appealing Party,* 51 Harv. L. Rev. 1058, 1059-60 (1938).

In this case each argument advanced by the appellees would, if accepted, support the refusal to enter summary judgment of liability in favor of Conex and Twin on one or both counts. If, on the other hand, there are no genuine issues of material fact remaining to be tried, and the district court committed the legal errors of which appellants complain, we may correct those errors, and direct the entry of such a judgment. We could, of course, decline to consider all of the legal issues tendered once we found one which would sustain the denial of summary judgment. But considerations of judicial economy suggest that when a § 1292(b) appeal is taken from the denial of summary judgment an appellate court should ordinarily consider all issues "properly put in dispute" bearing upon whether entry of judgment was appropriate. *Johnson v. Alldredge, supra,* 488 F.2d at 823. Thus the several motions to strike portions of the parties' briefs will be denied, and we will consider all grounds advanced in support of the grant of

summary judgment and all grounds suggested for sustaining its denial.

IV. The § 303 Claims Against ILA

Under § 303(a) of the National Labor Relations Act, 29 U.S.C. § 187(a), it is unlawful for a labor organization to engage in any activity or conduct defined as an unfair labor practice in § 8(b)(4) of the Act. Persons injured in their business or property by such a violation may bring suit for money damages against the labor organization which committed it.[7] Conex and Twin point out that the NLRB found that ILA had committed § 8(b)(4) unfair labor practices, and that the Second Circuit affirmed that finding. That determination, they suggest, is binding here, leaving nothing to be litigated except the determination of damages. The appellees resist this suggestion for reasons we now address.

A. Collateral Estoppel

The district court held that the NLRB's finding that the ILA had committed a § 8(b)(4) violation, made in a proceeding to which both ILA and the plaintiffs were parties, collaterally estops it from litigating its liability for damages on the § 303(b) count. ILA contends this holding was error.

First, ILA urges that the finding by the NLRB, an administrative agency, that the boycott complained of was illegal, is not entitled to res judicata effect. The cases relied upon in support of this contention[8] were, however, decided before the Supreme Court's decision in *United*

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[7] See note 3 *supra.*

[8] *See, e.g.,* Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Union, 359 F.2d 598, 602-03 n.7 (2d Cir.), *cert. denied,* 385 U.S. 832 (1966); United Brick & Clay Workers of America v.

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States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966), which stated that:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Since *Utah Construction* courts in several circuits have held that prior NLRB unfair labor practice determinations were controlling on the issue of liability, as to both facts and law, in a subsequent § 303(b) damage action. *E.g., International Wire v. Local 38, IBEW*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973) (res judicata against charging party); *Texaco, Inc. v. Operative Plasterers & Cement Masons*, 472 F.2d 594 (5th Cir.), *cert. denied*, 414 U.S. 1091 (1973) (res judicata against charged party); *Painters District Council 38 v. Edgewood Contracting Co.*, 416 F.2d 1081 (5th Cir. 1969) (res judicata against charged party); *Eazor Express, Inc. v. General Teamsters Local 326*, 388 F. Supp. 1264, 1266-67 (D. Del. 1975) (res judicata against charged party). These holdings are undoubtedly sound. The NLRB has been designated by Congress as the tribunal of choice for the adjudication of unfair labor practices, and the doctrine of primary jurisdiction is a judicial recognition of the importance of that designation. *See, e.g., Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 684-85 (1965). Board decisions are subject to judicial review on all issues of law. Factual issues are reviewed by

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Deena Artware, Inc., 198 F.2d 637 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953). In Riverton Coal Co. v. UMW, 453 F.2d 1035, 1042 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972), the legal issues sought to be foreclosed on the basis of a prior agency decision had not been decided in prior NLRB proceedings involving the same parties. Hence that case is inapposite here.

a substantial evidence standard, one at least as rigorous as that applied in reviewing non-jury judicial determinations, Fed. R. Civ. P. 52(a), and a good deal more rigorous than is applied to jury verdicts. When an NLRB decision subject to such judicial review has become final it is not readily apparent that it should have any less issue preclusion effect than would judgments resulting from non-jury or jury trials.

ILA next argues that even assuming applicability of collateral estoppel to issues of fact, the issues in this case are primarily legal, and on legal issues less deference to a prior decision is appropriate. The § 303(b) cases referred to above, giving res judicata effect to NLRB unfair labor practice judgments, recognize no such distinction. Moreover, both the Supreme Court and this circuit have rejected that approach. In *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 601-02 (1948), the Court made clear that issue preclusion applies both as to issues of fact and as to issues of law, so long as the same transactions and legal principles are involved and there has been no subsequent change in the governing law. *See Vanderveer v. Erie Malleable Iron Co.*, 238 F.2d 510, 514-15 (3d Cir. 1956), *cert. denied*, 358 U.S. 937 (1957). In *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 844-455 & n.10 (3d Cir. 1974), which concerned the collateral estoppel effect of a prior judicial determination that a collective bargaining agreement fell within the labor exemption to the antitrust laws, we expressly recognized that a prior determination of a mixed question of fact and law precluded relitigation of that issue, provided that the party to be estopped had "a full and fair opportunity" to present his claim in the prior litigation. *Id.* at 844.[9]

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[9] ILA also argues against recognition of the judgment in the unfair labor practice case in that the NLRB's proceedings are di-

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It is a settled principle of administrative law that the courts give considerable deference to the construction of statutes by those agencies charged with the primary responsibility for their enforcement. *E.g., Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969). Thus it is arguable that the scope of judicial review of agency decisions on questions of law is narrower than would be appellate review of court decisions on legal issues. But that difference does not suggest that res judicata on legal issues should be less applicable to agency judgments, for the rule of deference to agency interpretations of governing statutes is binding not only on a court reviewing an agency decision, but also on a court deciding a legal issue in the first instance. *E.g., Zemel v. Rusk,* 381 U.S. 1, 11-12 (1965). Moreover, in this case the decision of the NLRB was taken to the Court of Appeals for the Second Circuit which passed upon the legal issues involved.

Finally, ILA suggests that for two reasons it did not receive a "full and fair opportunity" to litigate before the NLRB. First, it contends that the Board's procedures provided inadequate opportunity for discovery against Conex and Twin. Had ILA been able to avail itself of the

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rected toward vindication of "public" rights, while those asserted in the § 303(b) count are only private. It is true that the charging party in an unfair labor practice proceeding before the Board advances the public interest in a fair and orderly labor marketplace. But the typical charging party acts primarily in his own interest to halt conduct that is injuring him personally. Equally when resorting to a § 303(b) remedy the plaintiff, while acting primarily in his own interest, vindicates the public policy of the National Labor Relations Act prohibiting unfair labor practices. That public policy, as interpreted by the NLRB, should in the § 303(b) case determine whether or not there has been a violation. We are therefore unpersuaded that the differing object of proceedings before the NLRB should serve as a ground for reducing their collateral estoppel effect.

discovery provisions of the Federal Rules of Civil Procedure, it argues, it might have been able to establish that Conex and Twin had developed their "tradition" of offpier consolidation by fraudulent avoidance of the 1969 Rules on Containers, and had such evidence been available it might well have led to a different result before the Board.

As a general rule, recognition of a judgment in a prior action between the same parties should be denied only upon a compelling showing of unfairness. *See* Restatement (Second) of Judgments (Tentative Draft No. 1, 1973) § 68.1 and Comment f. This is particularly true where, as here, the parties litigant were represented by expert lawyers who had every reason to expect that a defeat in the first action might lead to a second suit founded on the judgment. The Supreme Court has suggested, however, that in an appropriate case a district court may deny collateral estoppel effect on the ground of unfairness, even to a judgment in a prior action between the same parties, if there are "procedural opportunities available to the [defendant] that were unavailable in the first action of a kind that might be likely to cause a different result." *Parklane Hosiery Co. v. Shore,* 47 U.S.L.W. 4079, 4082 & n.15 (U.S. Jan. 9, 1979). The court included discovery among the procedural devices the unavailability of which in the first action may militate against application of estoppel by judgment. *Id.* at n.15. On the record considered by the district court, however, ILA has made no showing of unfairness. It stipulated before the NLRB that the record in *Balicer v. ILA, supra,* together with the supplemental affidavits submitted, sufficed for the decision of the unfair labor practice charges. When it made that stipulation ILA knew that Mr. Jacobs, a principal witness for the charging parties in *Balicer,* had previously testified before the Federal Maritime Commission regarding a pattern of payoffs on the docks which

facilitated evasion of the 1969 Rules. Thus the parties before the Board were undoubtedly on notice of the likely existence of the same evidence they seek to introduce in this proceeding. Nevertheless, ILA stipulated to a more limited record, bypassing the opportunity to resort to the not insubstantial provisions for production and examination of witnesses and documents available in NLRB cases. *See* 29 C.F.R. §§ 102.30, 102.31 (1977). Instead of probing the transactions described in the Jacobs testimony, ILA stipulated that "there [were] no material issues of credibility in the record before the [Board] for resolution requiring a formal hearing," and assured the ALJ that the unfair labor practice charges "[could] be fully resolved on the basis of the exhibits and transactions of testimony entered in the [*Balicer* case]." Joint App. 209-210. Thus whatever the faults of the discovery procedures available before the Board, ILA's failure to discover additional evidence was not the consequence of those procedures, but of its own decision not to seek or present further evidence in the NLRB proceeding. It cannot rely on procedural inadequacies in the NLRB case which in no way affected its outcome.

ILA relies on *Hudson River Fishermen's Ass'n v. FPC*, 498 F.2d 827 (2d Cir. 1974), for the proposition that collateral estoppel should not be applied where relevant evidence has come to light that could not have been discovered in the prior proceeding by the exercise of due diligence. That case involved an application to reopen a licensing proceeding before the Federal Power Commission in order to correct an error in a technical report which had been relied upon in that proceeding, which error could not have been discovered by the exercise of due diligence. The Second Circuit, reviewing the FPC's refusal to reopen the hearing, construed Section 313(b) of the Federal Power Act, 16 U.S.C. § 825(*l*)(b), as permitting reopening, and

remanded for a hearing. *Id.* at 833-34. Assuming that a principle similar to that announced in the *Hudson River* case also applies in NLRB proceedings, this is not the proper forum for its application. For as that case suggests, if ILA has found new evidence, its appropriate remedy is to seek to reopen the unfair labor practice case either before the NLRB or the Second Circuit. We note that such attempts have been made and rejected.[10]

Second, ILA argues that collateral estoppel is unfair because the Board's resolution of the unfair labor practice issue represented an abrupt and unanticipated change in the applicable legal doctrine. Prior to 1975, they argue, there were indications that the Rules on Containers were legal under both the antitrust laws and the Labor Act.[11] ILA cites no authority for the proposition that collateral estoppel effect may be denied to a judgment because it reflects a change in the prior applicable law, and in the § 303 context such a rule appears unwarranted. A primary pur-

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[10] These rejections also may indicate that evidence of the manner in which Conex and Twin acquired the stuffing and stripping work would not have had any impact on the NLRB decision. It was the General Counsel position in the § 10(*l*) case before Judge Lacey, and that of the charging parties before the Board, that regardless of how the latter acquired the work the Rules on Containers were an illegal work reacquisition agreement. The Board appears subsequently to have adopted that position. *See* International Longshoremen's Ass'n (Dolphin Forwarding, Inc), 236 NLRB No. 42, 98 LRMM 1276, 1277 n.3 (1978). Because we hold that there was an adequate opportunity to litigate the work acquisition contention, however, it is not necessary to rest our holding on the probable irrelevancy of the tendered evidence to the unfair labor practice determination.

[11] In *International Longshoremen's Ass'n, Local 1248 (U.S. Naval Supply Center)*, 195 N.L.R.B. 273 (1972), an attempt to enforce the Rules against an off-pier consolidator was held to be an unlawful secondary boycott. Thus a full year before the enforcement of the Dublin Supplement began the NLRB had questioned its legality.

pose of the § 303(b) remedy is to make the plaintiff whole for injury done to his business in violation of federal labor law. *Teamsters Local 20 v. Morton,* 377 U.S. 252, 260 (1964). To allow the union a defense of belief in legality in § 303 cases would cast the burden of such losses upon innocent parties in direct contravention of that policy. While the unforeseeability of an unfair labor practice judgment may reduce the deterrent value of the § 303 sanction, Congress's essential compensatory purpose remains, and should not be thwarted. Even if such a rule were recognized it might not help ILA here, for the prior actions upon which it claims to have relied never resulted in a final determination that the Rules on Containers were legal. Moreover, both the ICTC cases were decided prior to the adoption and enforcement of the Dublin Supplement, a development which might well have changed the earlier tribunals' view of the problem. The claim of an unanticipated change in the law does not persuade us that the judgment in the NLRB case should not bind ILA.

B. The Statute of Limitations

ILA pleads that the § 303(b) claim is time barred by the one year Puerto Rico statute of limitations, P.R. Laws Ann. tit. 31, § 5298(2), because Conex and Twin are incorporated in that Commonwealth and each conducts one end of its freight consolidator business there. The district court rejected that contention, holding that the consolidators' § 303(b) claim was governed by New Jersey's six year statute of limitations for actions in contract, N.J. Stat. Ann. § 2A:24-1 (West Supp. 1978), and thus was not time-barred. No federal statute imposes an express limitation upon actions brought under § 303(b) of the Labor Management Relations Act. The parties agree that in such a vacuum a federal court will apply the law of the state in which it sits. *See, e.g., United Auto Workers v. Hoosier*

Cardinal Corp., 383 U.S. 696 (1966); *Cope v. Anderson,* 331 U.S. 461 (1947). At this point they part company.

ILA argues that a federal court sitting in New Jersey on a § 303(b) case would look not to the most closely analogous New Jersey statute of limitations, but rather to New Jersey's choice of law rules. Under those rules, it suggests, New Jersey would apply not its own six year statute of limitations, but that of Puerto Rico. In advancing this argument ILA relies on the Rules of Decision Act, 28 U.S.C. § 1652, as interpreted in *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U.S. 487 (1941), and *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945). That statute and those authorities, however, deal with the law governing causes of action arising under state law. When, as in § 303(b) cases, the cause of action arises under federal law, they have no applicability. Which state statute is to be borrowed and how it is to be applied to a cause of action based on federal law are federal law questions, and are determined by federal statutory policy. *Holmberg v. Armbrecht,* 327 U.S. 392, 395 (1946). Thus state choice of law rules can govern the choice of a statute of limitations for a § 303(b) claim only if reference to those rules furthers substantive federal policy. *Moveicolor, Ltd. v. Eastman Kodak Co.,* 288 F.2d 80, 83-84 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961).

This principle has been recognized in § 303(b) cases. In *United Mine Workers v. Railing,* 401 U.S. 486 (1970), a case presenting, as does this, both a § 303(b) claim and an antitrust claim against a labor organization, the Court remanded to the Fourth Circuit so that it could consider whether the state statute of limitations applicable to the § 303(b) claim should be construed to apply, with respect to accrual of the cause of action, in the same manner as 15 U.S.C. § 15(b) had been construed in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1970), as applying to an antitrust claim. On remand Judge Craven recog-

nized that both § 303(b) and § 4 of the Clayton Act provided for recovery for injury to business or property, and concluded that the state statute of limitations governing the § 303(b) claim should be interpreted in the same manner as 15 U.S.C. § 15(b). Indeed he went further, suggesting to the district court that on remand it should consider whether to read into the state statute a tolling provision similar to 15 U.S.C. § 16(b) (which tolls § 15(b) for private antitrust actions during the pendency of government enforcement actions), to toll the time bar against the § 303(b) count during the pendency of unfair labor practice proceedings before the NLRB. *Railing v. United Mine Workers,* 445 F.2d 353 (4th Cir. 1971). *See also Kinty v. United Mine Workers,* 544 F.2d 706, 723 (4th Cir. 1976), *cert. denied,* 429 U.S. 1093 (1977); *Metropolitan Paving Co. v. International Union of Operating Eng'rs,* 439 F.2d 300, 306 (10th Cir.), *cert. denied,* 404 U.S. 829 (1971); *cf. Kreshtool v. International Longshoremen's Ass'n,* 242 F. Supp. 551, 554 (D. Del. 1965). These cases are authority for the rule that in a § 303(b) case the specific state statute of limitations that is adopted, and the manner of its adoption, are to be determined by the policies that underlie the federal regulatory statute.

ILA argues that *Cope v. Anderson, supra,* indicates that state choice of law rules ought invariably to determine the limitations period for federal causes of action. In *Cope,* an action brought under the National Bank Act, 12 U.S.C. §§ 63, 64, the Court applied the forum state's "borrowing statute" to determine the limitations period under the Act. The explanation for this holding is obscure, and it is far from certain that the *Cope* rationale was intended to extend either to judge-made choice of law rules or to actions under § 303(b). Furthermore, in a more recent decision, *UAW v. Hoosier Cardinal Corp., supra,* the Court expressly reserved the issue whether state choice of law rules should be

applied in determining the applicable statute of limitations under § 303(b). 383 U.S. at 705 n.8. *Cope* cannot, therefore, be regarded as foreclosing that question, which is squarely before us.

We resolve it in favor of a federal rule. The choice of law rule to be applied to a § 303(b) cause of action must meet two criteria. It must produce results consistent with national labor policy, and it should, insofar as is possible, be relatively easy to administer. On both counts, we think, application of a federal choice of law rule to determine the governing time bar is preferable. Federal labor policy may be thwarted by state limitations periods unduly short or discriminatory. *Cf. UAW v. Hoosier Cardinal Corp., supra,* 383 U.S. at 707 n.9. State choice of law rules, geared as they are to geographical factors or state policy interests, may be insensitive to this federal concern. From the viewpoint of ease of administration, state choice of law rules have an initial advantage. Already formulated, they are readily at hand. But their frequently complex calculus of contacts and interests may produce considerable difficulty in application and uncertainty of outcome without any corresponding improvement of result. A federal rule, in contrast, recognizing the more limited range of factors relevant under federal law, can be simplified.

While neither party has briefed the issue of the appropriate federal choice of law rule for § 303(b) cases, we conclude upon careful reflection that as a general rule the governing statute of limitations should be that of the state in which the federal court sits, unless a party can make a compelling showing that the application of that statutory time bar would seriously frustrate federal labor policy or work severe hardship to the litigants. *Cf. UAW v. Hoosier Cardinal Corp., supra,* 383 U.S. at 706. *See* Hill, *State Procedural Law in Federal Nondiversity Litigation,* 69 Harv. L. Rev. 66, 102-03 & n.64 (1955). Reference to the

forum state's statute of limitations absent some such showing provides an efficient and readily administrable rule for the vast majority of § 303(b) cases, while leaving leeway for the relatively rare instances in which the application of the forum state's statute would seriously distort the operation of the § 303 remedy. How serious that distortion must be to displace the forum state's statute of limitations we need not resolve in this case. Here the district court applied that limitations period. Neither party suggests that its application endangers federal labor policy or creates any risk of unfairness to the litigants. Absent such danger or risk the district court's application of the New Jersey statute must be affirmed.[12]

C. Illegality

ILA argues that even if it is collaterally estopped to contest the § 8(b)(4) violation, and even though the damage action was timely filed, its contention that Conex and Twin were operating at the time of the unfair labor practices without freight forwarder permits issued by the Interstate Commerce Commission (ICC), would, if such licenses were required, be a complete defense to the § 303(b) claim.[13] Conex and Twin have always asserted that they are not freight forwarders within the meaning of Part IV of the Interstate Commerce Act, 49 U.S.C. § 1002(a)(5)(A), and

[12] Because we hold that the choice of a governing limitations period, borrowed or otherwise, does not depend on New Jersey choice of law rules we need not decide whether, had we concluded New Jersey choice of law rules applied, the result would be different. We note, however, that on this record it seems likely that New Jersey would apply its own statute of limitations. *See* Schum v. Bailey, 578 F.2d 493 (3d Cir. 1978); Allen v. Volkswagen of America, Inc., 555 F.2d 361, 364 (3d Cir. 1977) (Seitz, C.J., concurring).

[13] A similar illegality defense is raised with respect to the § 4 Clayton Act claim as well, and is discussed, *infra*, Part V. C.

that the operating authority granted them by the Federal Maritime Commission (FMC) sufficed. The district court, without determining whether or not ICC licenses were required, concluded that if ILA could establish that they were, a judgment in favor of Conex and Twin on the § 303(b) claim would be precluded.

The district court recognized that in an unfair labor practice proceeding before the Board the charging party's violation of an unrelated statute is not a defense to a charge of unlawful secondary boycott activity. *See, e.g., NLRB v. Springfield Building & Construction Trades Council,* 262 F.2d 494 (1st Cir. 1958). But unlike an action before the Board, a damage action for injury to "business or property" under § 303(b), the district court held, was "purely compensatory," designed to return to plaintiffs only those losses to which they were legally entitled. If the plaintiffs' businesses were conducted without the required ICC permit, the court reasoned, they were "nonexistent in the eyes of the law, [and] entitled to no legal protection." District Court Opinion at 10, Joint App. 773.

This argument has a simplistic surface appeal reminiscent of the long discredited doctrine that a person driving without a license is a trespasser on the highway who may not recover for injury negligently inflicted upon him. *See, e.g., Potter v. Gilmore,* 282 Mass. 49, 184 N.E. 373 (1933); Annotation, 87 A.L.R. 1462. Like that doctrine the argument suffers from serious flaws. First, despite the fact that only compensatory damages may be recovered under § 303(b), *e.g., Teamsters Local 20 v. Morton,* 377 U.S. 252, 260 (1964), such actions, like the remedies available before the NLRB, serve an important deterrent purpose as well. Discussing the draft legislation that became § 303(b), Senator Taft, its sponsor, observed:

> . . . I think the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts and jurisdictional strikes.

93 Cong. Rec. 5060; II Leg. Hist. of Labor Management Relations Act of 1947 at 1371, *cited in Twin Excavating Co. v. Garage Attendants Local 731,* 337 F.2d 437, 438 (7th Cir. 1964). Indeed, a secondary boycott is in the nature of a tort, and it is settled doctrine that almost all causes of action sounding in tort have deterrent as well as compensatory rationales. *E.g.,* G. Calabresi, The Costs of Accidents (1970). Thus the effect of the proposed illegality defense is to sacrifice a recognized purpose of § 303 (b), the deterrence of secondary boycotts in violation of federal labor policy, in the interest of encouraging compliance with an entirely unrelated federal policy of ICC licensing. The regulatory scheme enforced by the ICC has goals substantially unrelated to the federal policy against secondary boycotts, and its own independent set of statutory sanctions. *See* 49 U.S.C. § 1021. Absent contrary evidence, we assume that Congress felt these sufficient for the enforcement of the ICC regulatory scheme. The creation by judicial fiat of an additional sanction—the withdrawal of the protection of § 303(b) because of a technical violation of an ICC licensing requirement—must be viewed, as was the "trespasser on the highway" doctrine, as enforcing a punishment disproportionate to the crime. In short, the proposed defense would disrupt the balance struck by Congress between permissible and impermissible labor activities, with no discernible benefit, and perhaps some loss, to the ICC regulatory scheme.

Thus we hold that the district court erred in concluding that the absence of an ICC license would be a defense to liability under § 303(b) for the unfair labor practices found by the NLRB. We express no view on the question whether, in the trial on damages, evidence of the absence of such a license would bear upon the extent of injury to the business or property of Conex and Twin. That, we think, would depend upon the proof of such injury, and the

relationship of that proof to the ability of Conex and Twin to carry on their business without a Part IV permit.

D. Equitable Defenses

ILA's equitable defenses tendered in opposition to summary judgment on liability were summarized by the district court as follows:

> ILA also argues estoppel *en pais,* laches, and equitable estoppel. These equitable theories are invoked based on ILA's claims that Conex intentionally avoided Challenging the Rules on Containers when they were first implemented because, in fact, Conex thrived on their existence: watching the enforcement of the Rules drive its competitors out of business while developing techniques, including bribery of dock bosses and alteration of shipping documents, to evade the Rules' strictures.

District Court Opinion at 14; Joint App. at 777. Without extended analysis the court ruled that a fuller development of the record was needed before it could rule on the sufficiency of the tendered defenses. Conex and Twin contend that this was error because the affidavits filed in support of the defenses were legally insufficient.

We start with the observation that the plaintiffs do not seek damages for any injury to their business or property occurring prior to the adoption of the Dublin Supplement in January, 1973. It was not until February, 1973, that the defendants commenced stripping and restuffing plaintiffs' containers. It was not until March, 1973, that plaintiffs were refused containers by the vessel owners. It was not until April, 1973, that they were blacklisted. In June, 1973, Conex filed an unfair labor practice charge with the NLRB. The record contains nothing suggesting that after January, 1973 Conex or Twin took or failed to take any

action which could be the predicate for a defense of laches or of estoppel. Indeed ILA does not so argue. Thus we can eliminate from consideration any possibility that a § 303(b) cause of action which accrued in January, 1973, was barred by laches. *Cf. Falsetti v. Local 2026, UMW,* 355 F.2d 658, 662 (3d Cir. 1966).

On appeal the ILA concentrates its equitable defense arguments on the period prior to the adoption of the Dublin Supplement. It points to two factors which it suggests are equitable bars to recovery for the post-Dublin Supplement injuries. First, Conex and Twin failed to file unfair labor practice charges between 1969, when the Rules were adopted, and 1973, when they were supplemented and finally enforced. Second, prior to 1973, while the Rules were in effect, Conex and Twin managed to evade their enforcement. This conduct, ILA contends, gives rise to an estoppel *en pais.* It reasons that the plaintiffs knew they were targets of the Rules as early as July, 1969, and that they took steps, including forgery, bribery, and diversion of cargo to other ports, to make it appear they were in compliance. At the same time, the plaintiffs failed to bring an action before the Board to challenge the Rules on Containers. "Since appellees have always obeyed both the 10(*l*) injunction and the Board's cease-and-desist order, such timely challenge would have prevented any further violations of the Act and put an end to Appellant's [sic] damages while they were minimal." (ILA Brief at 33-34). The effect of these evasionary and dilatory tactics, ILA contends, was to persuade it (a) that the Rules were being enforced and (b) that they were not harmful. In reliance on those appearances, it proceeded to force the adoption of the Dublin Supplement. Since the plaintiffs' wrongful conduct induced the adoption of the Dublin Supplement, ILA contends, they cannot now claim compensation for injury resulting from its enforcement.

The defendants have not cited, and we have not found, any case in which the defense of equitable estoppel or estoppel *en pais* has been recognized in an action brought pursuant to § 303(b) of the Act. We need not decide whether such a defense should be recognized, however, because it is clear that even on the defendants' theory of estoppel *en pais,* the affidavits supporting the defense were insufficient to sustain it. In the case upon which ILA principally relies, the four elements of estoppel *en pais* are defined:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct must be acted upon or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

United States v. Georgia Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970) (quoting *Hampton v. Paramount Pictures Corp.,* 279 F.2d 100, 104 (9th Cir.), *cert. denied,* 364 U.S. 882 (1960)). The relevant facts about the impact of the Rules apparently were known to the plaintiffs, and thus the first element of an estoppel exists. But there are no facts in the record to support any of the other three elements of the defense. ILA has cited no evidence for its implausible assertion that the consolidators' evasion of the Rules or failure to file an unfair labor practice charge was intended, or could reasonably have been believed to be intended, to induce it to bargain for the Dublin Supplement. The pleadings and affidavits indicate that the plaintiffs hoped that ILA would not respond at all, so that their evasion of the Rules could continue. Nor is the failure of Conex and Twin to bring an NLRB case prior to 1973 a fact which ILA had a "right to believe" was intended to induce the adoption of the Supplement. A rule that persons who

failed to charge a continuing unfair labor practice at the first opportunity could for that reason later be barred from recovery, even when as in this case the severity of the practices drastically increased, would have dangerous consequences for national labor policy. Proceedings before the NLRB by a charging party involve substantial expense and often substantial risk of retaliation. Firms not yet seriously injured should not be compelled to risk a confrontation at the earliest possible moment for fear that if they do not they will thereafter be stripped of the protection of § 303(b).

ILA has also failed to suggest any facts indicating that it was in fact ignorant of the true state of affairs on the docks, or that it relied on an inaccurate version of events in adopting the Dublin Supplement. To the contrary, all of the evidence in the record suggests that ILA was very much aware that the Rules on Containers were *not* enforced.[14] Indeed, several sections of the Dublin Supplement are directed in so many words to the "evasion" or circumvention of the Rules on Containers. *See* Interpretive Bulletin No. 1, Interpretations 1.3-3, 1.6, 1.7, 1.8. ILA nowhere cites any information meeting the standards of Fed. R. Civ. P. 56(c) suggesting that it ever held, or acted upon, anything other than an accurate view of events.

Since there is no material issue of fact with respect to three of the four elements of an estoppel, we conclude that the equitable defense asserted by ILA would be legally insufficient to preclude the imposition of liability under § 303(b) and that the district court erred in denying summary judgment in order to explore it further. We hold, then, that the order appealed from, insofar as it denied a

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[14] *See, e.g.*, Letter of Thomas W. Gleason [President of the ILA] to James Dickman [President of NYSA] May 11, 1972. Joint App. 321a.

summary judgment of liability on Count III of the Conex and Twin complaints must be reversed.

V. The § 4 Clayton Claim

In Count I of their complaints Conex and Twin charge that the Dublin Supplement and the steps taken to implement it are a concerted refusal to deal, and thus a *per se* violation of the Sherman Act. While Count III seeks relief only against ILA, County I joins both union and employer defendants, all of whom, admitting both the agreement and the steps taken to implement it, assert several defenses to the antitrust claim, which we now consider.

A. The Labor Exemption

The principal defense tendered in opposition to summary judgment is that both the Rules and the Dublin Supplement are collective bargaining arrangements falling within the labor exemption to the antitrust laws. The defendants concede that both agreements involved concerted action between the ILA and the employer defendants, and hence are ineligible for the statutory antitrust exemptions provided in the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113. *UMW v. Pennington,* 381 U.S. 657, 661-62 (1965); *United States v. Hutcheson,* 312 U.S. 219, 232 (1941).

Thus the dispute is over the applicability of the so-called non-statutory labor exemption, defined by the Supreme Court in the series of cases beginning with *Apex Hosiery v. Leader,* 310 U.S. 469 (1940), and culminating in *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975). That dispute, in turn, presents two aspects: (1) whether the NLRB finding of violations of §§ 8(b)(4)(ii)(B) and 8(e) precludes relitigation of the illegality of the charged conduct as a matter of federal labor law; and (2) whether, assuming such ille-

gality, the nonstatutory labor exemption should nevertheless be available.

1. The Preclusive Effect of the NLRB Judgment On Labor Law Issues

In Part IV. A., *supra,* we held that ILA was estopped by the judgment in the NLRB unfair labor practice case from relitigating in the § 303(b) case the legality of the Dublin Supplement and the steps taken to implement it. To the extent that the undisputed facts and conclusions of law referred to in that Part are relevant on the availability of the labor exemption to ILA, our prior analysis is equally applicable. Moreover, NYSA, as the collective bargaining representative of the vessel owners and stevedores, was a party to the NLRB action, an appellant in the Second Circuit and an unsuccessful petitioner for certiorari in the Supreme Court. None of these defendants contend that they were so insufficiently represented before the Board that they should not be bound to the same extent as ILA by the resulting judgment.[15] Since both ILA and the employer defendants were represented before the NLRB and in the Court of Appeals in the Second Circuit, we hold that they are equally bound by the judgment, and estopped to contest the finding that their efforts to enforce the Rules were unfair labor practices. We reject, as well, appellees' contention that recognizing the issue preclusion effect of the NLRB decision deprives them of their seventh amendment right to a jury trial. *Parklane Hosiery Co. v. Shore, supra,* 47 U.S.L.W. at 4082 & n.19.

[15] The stevedore defendants do contend that as a matter of antitrust law the record on summary judgment is legally insufficient to bind them. That contention is discussed at Part IV. F, *infra.*

2. The Effect of the § 8(e) Violation upon the Availability of the Labor Exemption

We are faced, then, with the question whether a contract or combination, which has been adjudicated to be a violation of the prohibition in § 8(e) against contracts calling for secondary boycotts, can nevertheless be held to be within the nonstatutory antitrust exemption because it was negotiated as a part of a collective bargaining agreement.

Prior to 1959 it was an unfair labor practice under then § 8(b)(4)(A) of the National Labor Relations Act for a union to urge employees of an employer to refuse to perform work in order to compel their employer to cease doing business with a third party. That prohibition did not apply to employer refusals to deal that were embodied in collective bargaining agreements, however, and unions remained free to seek such agreements by collective bargaining, informational picketing or otherwise. *See Brotherhood of Carpenters v. NLRB,* 357 U.S. 93 (1958) (*Sand Door*). Congress concluded that these "hot cargo" agreements gave unions too much leverage against secondary parties, and in 1959 it amended § 8(b)(4), to prohibit coercion directed not only at employees of the primary employer, but also against the employer himself. It also added in § 8(e) a prohibition upon contracts obligating employers to refrain from doing business with third parties.[16] In *National Woodwork Manufacturers Ass'n v. NLRB, supra,* the Court narrowly construed the prohibitions in the 1959 amendments. Distinguishing *Allen Bradley Co. v. Local Union No. 3, IBEW,* 325 U.S. 797 (1945), as a case involving secondary boycott activity, the Court held that while secondary activity aimed at acquiring for

[16] Congress at the same time recognized that the special historical situation in the construction and apparel industries justified a limited exception to § 8(e) for those two industries. Those provisions are, of course, inapplicable here.

employers and union members work already being performed by third parties was prohibited, Congress did not intend the prohibition of work preservation clauses in collective bargaining agreements even though such clauses might fall within the literal terms of § 8(e). Indeed the Court explicitly recognized that the 1959 amendments made no change in the rule of *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), that work preservation is a mandatory subject of collective bargaining. 386 U.S. at 642. The determination whether a given demand went beyond the legitimate primary area of work preservation and into the forbidden secondary boycott area was said to involve in each instance a factual inquiry into all the surrounding circumstances. 386 U.S. at 644. Here the forum of choice, the NLRB, has made that factual inquiry and has determined that the Rules are directed not at work preservation, but at acquiring work from the employees of a secondary employer.

One consequence of the NLRB's decision is to foreclose the argument that the object of the agreement ultimately reached is a mandatory subject of collective bargaining, for an agreement that violates § 8(e) cannot meet that standard. The NLRB has stated that:

> the Act does not permit . . . the insistence, as a condition precedent to entering into a collective bargaining agreement, that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy.

National Maritime Union (Texaco Co.), 78 N.L.R.B. 971, 981-82 (1948), *enf'd,* 175 F.2d 686 (2d Cir. 1949), *cert. denied,* 338 U.S. 954 (1950). *See also NLRB v. Wooster Div., Borg Warner Corp.,* 356 U.S. 342, 360 (1958) (Harlan, J., concurring and dissenting).

A further consequence of the NLRB's factual determination, in the antitrust context, is suggested in Justice Brennan's *National Woodwork* discussion:

> In effect Congress, in enacting § 8(b)(4)(A) of the Act [the statutory predecessor of § 8(e)], returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co., supra,* and barred as a secondary boycott union activity directed against a neutral employer, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere.

386 U.S. at 632. Justice Brennan's reference to *Duplex Printing Press Co. v. Deering,* 254 U.S. 443 (1921), and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n,* 274 U.S. 37 (1927), is to cases holding that despite § 20 of the Clayton Act a secondary boycott could be enjoined in a private action under the antitrust laws. The quoted dictum, although suggestive of the effect of a § 8(e) violation on the non-statutory antitrust exemption, is not decisive. Both *Duplex Printing* and *Bedford Cut Stone* were decided on statutory exemption grounds prior to the full emergence of the non-statutory exemption. But it must be kept in mind that §§ 8(b)(4) and 8(e), while housed in the National Labor Relations Act, are, like the Sherman Act, statutes reflecting the basic federal economic policy against restraints upon competition in the marketplace for goods and services as distinct from the labor market. Thus §§ 8(b)(4) and 8(e) reinforce rather than conflict with the basic policy of the antitrust laws, and suggest a cautious approach to the recognition of a non-statutory antitrust exemption for conduct in violation of their

prohibitions.[17] Nonetheless there remains room for the argument that even though ILA achieved at the bargaining table an object that is unlawful under §§ 8(b)(4)(ii)(B) and 8(e), and thus not a mandatory subject of collective bargaining, the non-statutory exemption should nevertheless apply.

The term non-statutory exemption, commonly used in discussing the interface between the often conflicting national antitrust and labor policies, is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market. The opinion generally credited as originating that construction of the antitrust laws is that of Chief Justice Stone in *Apex Hosiery Co. v. Leader, supra.* In that case, an organizational dispute erupted into a sit-in strike which stopped production, and halted the shipment of finished goods. The Court held this conduct exempt from the antitrust laws on two grounds. The union's goal, "elimination of price competition based on differences in labor standards . . .," was not "the kind of curtailment of price competition prohibited by the Sherman Act." 310 U.S. at 503-04. Moreover, Justice Stone held, there was no showing that the challenged restraint was "intended to have or in fact ha[d]" an effect upon the product market. *Id.* at 512. The Court thus distinguished *Duplex Printing Co.* (a classic secondary boycott) and *Bedford Cut Stone* (which involved a "refusal to handle" the primary's product) because in those cases the intent and effect of the conspiracy had been to restrain the product market by pressuring secondary parties to withdraw their patronage

[17] The Supreme Court has recently cautioned that all exemptions from the antitrust laws, including the labor exemption, are to be narrowly construed. Group Life & Health Insurance Co. v. Royal Drug Co., 47 U.S.L.W. 4203, 4210 (U.S. Feb. 27, 1979).

from the target manufacturer. *Id.* at 505-06. It would seem therefore that had such a secondary purpose and effect been shown, Sherman Act liability would have attached. *See also United States v. Hutcheson, supra,* 312 U.S. at 241-42 (Stone, C.J., concurring).

Apex Hosiery establishes two principles central to the subsequent development of the non-statutory exemption. First, the rationale of the exemption is protection of the union's power to eliminate competition in the labor market over wages and working conditions. Restraints operating on that primary market are presumptively outside the scope of the Sherman Act. Second, restraints, like those in *Duplex Printing Co.* and *Bedford Cut Stone,* which are aimed at controlling a secondary product or service market are suspect, and are presumptively covered by the Sherman Act.

When the Court first had occasion to consider the application of the infant non-statutory exemption to a collective bargaining agreement, it might have taken the position that anything achieved as a result of collective bargaining with the primary employer was exempt from antitrust sanction. Such a course would have avoided many difficulties. In *Allen Bradley Co. v. Local No. 3, IBEW,* 325 U.S. 797 (1945), however, the Court took a different turn, holding that the distinction between union efforts aimed at the labor market and those aimed at the product market applied even to a collective bargaining agreement. In that case a union successfully negotiated, by legitimate means, refusal-to-deal clauses with local electrical equipment manufacturers and contractors. The union's success in obtaining those agreements created a product market cartel in the New York area, which in time came to look not only "to terms and conditions of employment but also to price and market control." *Id.* at 800. The union had actively assisted in policing and protecting that cartel.

When an excluded electrical manufacturer sued to enjoin union activities on behalf of the cartel, the union's participation in the illegal scheme was held to be an antitrust violation despite the collective bargaining context and despite the relationship of the restraints to wage and job stability. With the *Allen Bradley* decision faded any hope for a bright line between union activities exempt from and subject to the antitrust laws based on the existence of a collective bargaining relationship. The opinion, however, strongly reaffirmed the suggestion in *Apex Hosiery* that secondary product or service market restraints must meet a higher standard of justification to claim the antitrust exemption. *Cf. National Woodwork Manufacturers Ass'n v. NLRB, supra,* 386 U.S. at 628-630 (characterizing *Allen Bradley* as a secondary work acquisition scheme that would now be forbidden under § 8(e)).

Justice Black's opinion in *Allen Bradley* indicates that if a union coerced a refusal to deal clause, or some other clause having secondary market effects, solely in its own interest, and not in the interest of conspiring businessmen, the exemption applies. *See* 325 U.S. at 809-10. Under that reading of *Allen Bradley,* collective bargaining agreements might have been held exempt from Sherman Act scrutiny, regardless of their impact on the non-labor marketplace, absent a showing of an intent on the part of the union to join with employers in a larger Sherman Act conspiracy. And an appropriate test for whether the union was to be deemed to be acting solely in its own interest might well have been whether the subject matter of the agreement was a permissive or mandatory subject of collective bargaining.

In *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), the Court considered a collective bargaining agreement with a multi-employer unit of coal producers in which the union agreed with the employers in that unit to impose

the agreed-upon wage scale upon all coal producers with whom it had a collective bargaining relationship. The Union contended that since the agreement concerned wage standards, a quintessential labor market concern, it was exempt from the antitrust laws. Six Justices rejected that contention. Justice White, writing for three members of the Court, conceded that "wages lie at the very heart of those subjects about which employers and unions must bargain." 381 U.S. at 664. Recognizing that the union could unilaterally have adopted a uniform wage standard as a matter of bargaining policy, the Court held that the alleged agreement was not necessarily exempt. Justice White wrote:

> We think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy.

381 U.S. at 665-66. He went on, however, to suggest that the unavailability of the exemption was not dependent upon a predatory intention on the part of the employers in the bargaining union.

> From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest

> but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy.

381 U.S. at 668.

Justice White's definition of the prohibited conduct is decidedly ambiguous. The first quoted excerpt seems to say that the antitrust evil is knowing union participation in an employer's conspiracy to eliminate competitors, a view consistent with some language in *Allen Bradley*. But the second passage suggests that the more serious evil, impinging upon both labor and antitrust policy, is the union's restriction of its freedom to deal with other competitor employers. That defect, Justice White suggested, remained "without regard to predatory intention or effect in the particular case." 381 U.S. at 668. This latter theme echoes the concern expressed in *Apex Hosiery* and *Allen Bradley* with agreements directed at secondary parties.

Citing Justice White's opinion, the plaintiffs argue that *Pennington* stands for the proposition that "an agreement which is tactically designed to achieve objectives outside the bargaining unit is not entitled to antitrust immunity." Plaintiffs' Brief at 38. This reads the *Pennington* holding too broadly. Although it is denominated the opinion of the Court, Justice White's *Pennington* opinion did not command a majority for his labor exemption discussion. In a concurring opinion Justice Douglas, writing for three Justices, expressly stated that as he read

Justice White's opinion, it "reaffirms the principles of *Allen Bradley* . . . ." 381 U.S. at 672. He suggested that on remand, the jury should be instructed that in order to find an antitrust violation, they must conclude *both* that the union agreed to press a wage scale that smaller employers could not pay, and that the agreement "was made for the purpose of forcing some employers out of business. . . ." *Id.* at 672-73. Elsewhere, he stressed that the "purpose" described earlier involves both "knowledge" that the minor manufacturers would be driven out of business, and "intent" to do so. *Id.* at 675. Since the three Justices who joined in the Douglas opinion would have upheld the union's claim of antitrust immunity absent a showing of predatory intent, and three others would have upheld the claim of immunity on broader grounds announced by Justice Goldberg, the Douglas opinion may well be read as limiting antitrust liability for agreements concerning subjects at the "very heart" of the collective bargaining process to cases where predatory intent can be shown. *Accord, Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 903 (5th Cir. 1974) ("concerted purpose"); *Lewis v. Pennington*, 400 F.2d 806, 814 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968) ("predatory intent"); Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. Chi. L. Rev. 659, 720-21 (1965); 1 P. Areeda & D. Turner, *Antitrust Law*, ¶ 229e at 211 (1977). Such a standard would tend to insulate collective bargaining over subjects like wages, which are at the core of legitimate union concern, from the disrupting effect of potential antitrust sanctions. *See Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc., supra*, 504 F.2d at 908; 1 P. Areeda & D. Turner, *supra*, ¶ 229e at 209-11.

If *Pennington* were the controlling precedent the plaintiffs' motion for summary judgment should properly have been denied. Assuming *arguendo* that the agreement here

concerned a subject at the "very heart" of the collective bargaining process, the affidavits suggest that in determining the intent of ILA and the employer defendants issues of fact remain. ILA avers that the sole purpose of the Dublin Supplement was to protect union job opportunities. The vessel owners say that they did not really want the acquired business, and that they therefore lacked the predatory intent required by *Pennington*. We are mindful that summary judgment is generally inappropriate in antitrust cases "where motive and intent play leading roles." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

A second line of authority, however, permits the imposition of antitrust liability without a showing of predatory intent. On the same day that *Pennington* was decided the Court handed down *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), which involved a multi-unit collective bargaining agreement in the food store industry. The agreement imposed on the entire bargaining unit a restriction on marketing hours, a direct restraint on the product market. Jewel Tea Company, a member of the unit, signed the agreement under protest but promptly brought an action for declaratory and injunctive relief against the union. It contended that the marketing hours restraint violated the Sherman Act because it limited the hours during which Jewel could compete with other meat retailers in the bargaining unit. The Court's judgment held that the agreement was exempt from the Sherman Act, but three opinions were filed, each receiving three votes. Justice White, announcing the judgment, in an opinion joined by Chief Justice Warren and Justice Brennan, said that for resraints on the product market, the test of exemption was whether the restraint:

> . . . is so intimately related to wages, hours and working conditions that the unions' successful attempt

> to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and its [sic] therefore exempt from the Sherman Act.

381 U.S. at 689-90 (footnote omitted). But if a union demanded, and an employer agreed to, an anticompetitive restraint designed to protect an interest not a mandatory subject of bargaining, White "seriously doubt[ed]" that the antitrust exemption would apply. *Id.* at 689. Relying on NLRB decisions holding that hours of work were a subject of mandatory bargaining, he then considered whether the restriction on hours of operation was justified by its close relationship to the union members' interest in avoiding night work. *Id.* at 692. The trial court had found that such operations would threaten that protected interest. Since that finding was not clearly erroneous, Justice White said that the agreement was exempt. *Id.* at 697.

Justice Goldberg, concurring in an opinion in which Justices Harlan and Stewart joined, proposed a test similar to, although somewhat broader than Justice White's. Goldberg would have held that "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws." *Id.* at 710. He also observed that "decisions of the Labor Board as to what constitutes a subject of mandatory bargaining are, of course, very significant in determination of the applicability of the labor exemption." *Id.* at 710 n.18.

The six Justices comprising the *Jewel Tea* majority were thus agreed that when a collective bargaining agreement imposed restraints upon the employer's product market, the most significant issue in determining the availability of the labor exemption was whether the restraint involved a mandatory subject of collective bargaining.

Moreover Justice White's opinion suggests that the burden is on the union to demonstrate that the challenged product market restraint is in fact no broader than necessary to promote the union's interest in such a subject. Absent such a demonstration, the restraint must fall. *Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pacific Elec. Contractors Ass'n,* 579 F.2d 484, 503 (Hufstedler, J., concurring and dissenting).

The Court's most recent pronouncement on the application of the Sherman Act in the labor context, *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975), is consistent with this analysis. In that case a labor organization coerced a general contractor into an agreement to hire only those subcontractors who had collective bargaining agreements with it. Like the Jewel Tea Company, the contractor sued to invalidate the agreement under the Sherman Act. The case did not involve a collective bargaining agreement, and so, as Justice Powell carefully noted, considerations peculiar to the collective bargaining context were absent. 421 U.S. at 625-26. Nonetheless, the Court analyzed the restraint in terms similar to *Jewel Tea*'s. It found that the goal of the agreement—the organization of non-union employers—was legitimate. But the agreement enacted in *Connell,* Powell held, reached too broadly, for it operated as a direct restraint upon the competition of non-union subcontractors, even if their competitive advantage was derived from efficiency rather than substandard wages and working conditions.

> This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

Id. at 625. Despite its explicit distinction of the collective bargaining situation, the *Connell* mode of analysis is similar to that of the *Jewel Tea* majority. The requirements for antitrust exemption are, first, that the market restraint advance a legitimate labor goal, and, second, that the agreement restrain trade no more than is necessary to achieve that goal. In addition *Connell* clarifies the relationship between unfair labor practice remedies under § 8(e) and treble damage actions under the antitrust laws. Local 100 had argued that the unfair labor practice remedies under § 10(*l*) and § 303 of the Act were exclusive and precluded a suit in antitrust based on a § 8(e) violation. The Court rejected this contention, stating that such remedies were available despite and in addition to the availability of Labor Act remedies. *Id.* at 633-34.

Were this an action for injunctive relief, we think that *Jewel Tea* and *Connell* would require a summary judgment rejecting the labor exemption. The anticompetitive effect of the enforcement of the Rules and the Dublin Supplement is on this record undisputed. By requiring that LCL and LTL containers be stripped at the dock, the Rules exerted a substantial upward pressure upon the price of container shipping. More important, the Boycott provisions of the Dublin Supplement led to the foreclosure of all LCL and LTL consolidators operating within the forbidden fifty mile range from the entire shipping market between the Port and Puerto Rico. This anticompetitive impact is significant and uncontested. These anticompetitive effects cannot now be justified by their advancement of legitimate labor goals. Six Justices in the *Jewel Tea* majority began the exemption inquiry by asking whether the subject matter of the challenged agreement was itself, or was clearly related to, a mandatory subject of collective bargaining. Whether one prefers the White or Goldberg formulations in *Jewel Tea,* under either a finding that the Rules were not a mandatory subject of bargaining effec-

tively undercuts any contention that they so "fall within the protection of the national labor policy," as to be completely exempt from antitrust scrutiny. *See, UMW v. Pennington,* 381 U.S. at 665 (White, J.); *Jewel Tea,* 381 U.S. at 689 (White, J.); 381 U.S. at 70 (Goldberg, J., dissenting) (all suggesting that whether a particular union demand is a mandatory subject of bargaining central to a determination of the scope of the labor exemption). Here, the NLRB has held that the Rules and the Dublin Supplement violated §§ 8(b)(4) and 8(e) of the Labor Act. Hence the "direct and overriding interest of unions" in mandatory subjects of bargaining, 381 U.S. at 732 (Goldberg, J., dissenting), is absent. Nor can it fairly be contended in the wake of that holding that the Rules are protected because they served a legitimate union interest. The NLRB has found that the object of the Rules was work acquisition, an activity that is condemned by national labor policy. *NLRB v. Enterprise Ass'n. of Pipefitters,* 429 U.S. 507, 529 n.16 (1976). As we noted above, *Apex Hosiery, Allen Bradley,* and *Nat'l Woodwork Manufacturers Ass'n* all indicate that illegal secondary activity of this kind is subject to Sherman Act sanctions.

Although no court has yet had occasion to hold that an NLRB finding of an unfair labor practice precludes recognition of complete non-statutory antitrust immunity, well reasoned decisions in other circuits support that conclusion. *See Mackey v. National Football League,* 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed,* 413 U.S. 801 (1977) (Lay, J.) ("federal labor policy is sufficiently implicated to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining."); *Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pacific Electrical Contractors Ass'n.,* 579 F.2d 484, 503 (9th Cir. 1978), *cert. denied,* 47 U.S.L.W. 3465 (U.S. Jan. 9, 1979) (Hufstedler, J., concurring and

dissenting). That result is also consistent with this court's decisions in *International Ass'n of Heat & Frost Insulators v. United Contractors' Ass'n,* 483 F.2d 384 (3d Cir. 1973), *modified,* 494 F.2d 1353 (3d Cir. 1974). *Heat Insulators* was an antitrust suit by AFL-CIO craft locals against a contractors' association and its assertedly "captive" union. Many of the charged antitrust violations, if proven, would also have been unfair labor practices. In the court's initial opinion, Judge Forman upheld the primary jurisdiction of the NLRB over those unfair labor practices. He stated that "if the allegations [of unfair labor practices] are true, then such acts would not be immune" under the labor exemption. 483 F.2d at 402. When informed that the Board had already heard the plaintiff's unfair labor practice charges and determined there was no labor law violation, the court vacated its opinion requiring that the district court certify the labor issues to the Board. But it recognized that the NLRB holding that the agreements were legal under the Labor Act was "not conclusive" on the issue of their illegality under the antitrust laws. 494 F.2d at 1354, *citing Meat Cutters v. Jewel Tea Co., supra.* Taken together the two opinions in *Heat Insulators* suggest that conduct illegal under federal labor law can claim no immunity from antitrust sanctions.

In support of the contrary position the appellees rely principally upon *Commerce Tankers Corp. v. National Maritime Union,* 553 F.2d 793 (2d Cir.), *cert. denied,* 434 U.S. 923 (1977). There, as here, a clause in a collective bargaining [sic] had been held to be in violation of § 8(e) in a prior NLRB proceeding. There, as here, the injured party argued that the NLRB's finding of illegality eliminated the antitrust exemption. The district court rejected the antitrust claim on another ground, and thus did not reach the immunity issue. On appeal, the district court's ground of decision was rejected by the Second Circuit. That court,

however, refused to rule that the § 8(e) violation eliminated the antitrust exemption, both because the district court had not considered the issue, and because only one party had briefed it on appeal. It did state in dictum that it did not think that the finding of a § 8(e) violation "necessarily determine[d]" the immunity issue, although it "le[nt] support to appellant's position." 553 F.2d at 802. The *Commerce Tankers* court's reasons for disposing of the exemption issue suggest that the holding does not have the force of a fully considered decision on the merits. Moreover, the *Commerce Tankers* opinion does not explain why the finding of a § 8(e) violation did not "necessarily determine" the exemption question. Judge Lumbard's cogent dissent, which argued a position similar to that adopted here, thus went unanswered. To the extent that *Commerce Tankers* may suggest the possibility that a § 8(e) violation may be completely exempt under the Sherman Act we find it unpersuasive.

Thus we hold that the enforcement of Rules and Dublin Supplement was not exempt under the Sherman Act. Those agreements are illegal under § 8(e), and under the tests of *Jewel Tea* and *Connell* could be enjoined. If this were an action for injunctive relief brought pursuant to § 16 of the Clayton Act an injunction against their prospective operation plainly would be required. That does not end the inquiry, however, for this is an action, not for prospective relief, but for money damages. As we noted above, the term non-statutory exemption describes an interpretation of the antitrust laws. Both primary and secondary authorities discussing the non-statutory exemption tend to assume that if a Sherman Act violation is shown, then all antitrust remedies are equally available. There is no *a priori* reason why this should be the case. If the Sherman Act itself can be interpreted to accommodate conflicting federal labor and antitrust policies Clayton Act § 4 can be

similarly interpreted. We think that a distinction between injunctive and treble damages remedies is warranted.

Where an action seeks only declaratory or injunctive relief, a finding that an agreement violates § 8(e) should always remove the antitrust exemption. Once it is clear that a § 8(e) violation has occurred no labor policy is advanced by permitting ongoing operation of an illegal contract, and injunctive relief pursuant to § 16 of the Clayton Act is appropriate. In considering the availability of § 4 relief, however, a more refined analysis is required. For while the agreement which resulted from the collective bargaining process may have been found to be illegal, it is possible that at the time when the negotiating session took place the parties reasonably believed that their agreement was directly related to the lawful goal of work preservation. That possibility raises a labor policy consideration which the Supreme Court has not yet addressed: the extent to which antitrust exemption should protect not only lawful labor agreements, but also the collective bargaining process. In our view, consideration of the competing public policies which may be implicated indicates the need to recognize a limited labor exemption defense to a claim for money damages under the Clayton Act for conduct which has been held to be illegal under federal labor law.

The decision in *Allen Bradley* not to exempt from antitrust remedies all collective bargaining agreements with a primary employer created a powerful potential sanction against both the union and the employer. Today this sanction provides both parties to the bargaining process with a strong incentive to take into account in their negotiations the public interest in competition in the secondary marketplace. Especially in oligopolistic industries—and Atlantic shipping is one—removing antitrust incentives entirely would place entirely too much uncontrolled economic

power in the hands of those at the bargaining table. But the question remains how much antitrust incentive is necessary to encourage the parties to the collective bargaining process to take into account anti-competitive injury to secondary parties. One possible answer is that the § 16 injunctive remedy, coupled with § 303 damage remedy against the union, and the NLRB's unfair labor practice jurisdiction is all the incentive that is required. We think not, however, for while those remedies may provide strong incentive for unions not to make excessive secondary demands, they provide very little incentive to employers to resist such demands. Employers may have no predatory purpose against secondary targets, but may nevertheless be quite willing to sacrifice in the bargaining process the interests of those targets in exchange for concessions on other bargaining issues. Since employers are not liable for damages under § 303, the only risk they would run from overwilling acquiescence in a bargained for § 8(e) violation would be that either in a § 10(*l*) or § 16 injunctive action they would be made to stop. That would give employers the best of all possible worlds at the collective bargaining table, since they would keep the benefit of the concessions bargained for on other issues, while the risk of economic injury to secondary targets would be borne by those targets and an often shallow pocket union. Complete removal from the bargaining equation of the § 4 incentive to employers to take into account injury to secondary targets would not, we think, be in the public interest.

Nor is there unfairness in requiring employers to resist excessive union claims. Employers are not, after all, without remedies against illegal demands. They can refuse to bargain and the Board will, we must presume, sustain that refusal to bargain. They can accede to the union demand, and then sue, as Jewel Tea Company and

Connell Construction Company did, to invalidate the agreement under federal law. Or they can simply refuse to implement the agreement, once adopted, because it is in violation of § 8(e). Any resulting strike pressure might then be enjoined as in violation of § 8(b)(4). We recognize that these remedies may not, in the short run, be as conducive to labor peace as acquiescence. But this court and others have recognized that affirmative obligations imposed by non-labor federal legislation may on occasion require an employer to resist illegal union demands even at the cost of a strike. *See Atlantic & Gulf Stevedores, Inc. v. OSHRC,* 534 F.2d 541 (3d Cir. 1976).

On the other hand, we recognize that a damage remedy is effective as a deterrent only when its application to an agreement can be foreseen by the parties at the time they are engaged in collective bargaining. Moreover, since the § 4 remedy, while in part compensatory, has a strong punitive element, it may seem harsh to apply it to conduct which the parties had no reason to believe would ever be held to be illegal, and may even have reasonably believed to be legally compelled. Concern about the lack of meaningful deterrence is particularly relevant when the determination of illegality results from an unanticipated shift in NLRB policy. Antitrust policy may not be significantly advanced by giving retroactive effect, in a damage action, to such unanticipated shifts in interpretation of §§ 8(b)(4) and 8(e). Thus it seems to us that there is room for a defense to a § 4 damage claim that would not be available in a § 16 injunctive action or a government injunctive action.

Casting the issue in terms of an exemption defense to a § 4 damage action affords an opportunity to strike a balance between the interest of parties to the collective bargaining process, and those of secondary targets. If we eliminate entirely the element of foreseeability, and allow a § 4 treble

damage recovery whenever the agreement is found to be illegal, the scales tilt too far away from the national interest in collective bargaining over arguably legitimate subject matters. If, on the other hand, we impose too low a burden on those asserting a lack of foreseeability defense, we risk slighting the national interest in deterring anticompetitive injury to secondary parties. The proper accommodation, we think, is recognition, in the collective bargaining context, of a defense to § 4 damage recovery involving several elements. Where, as here, a collective bargaining agreement, or conduct taken pursuant to it, has been shown to be illegal under federal labor law, a secondary party injured in his business or property by either has made out a prima facie case under § 4. At that point, to accommodate the labor policy favoring collective bargaining, the defendants may assert, first, that at the time they acted (here, the Dublin meeting and later) they could not reasonably have foreseen that the subject matter of the agreement being challenged would be held to be unlawful under § 8(b)(4) or § 8(e). If they fail to prove that the illegality determination was unforeseeable, the defendants should not be exempt from liability for damages under § 4. A successful showing that the determination of illegality was not reasonably foreseeable is not alone enough to establish an exemption defense, however, for *Jewel Tea* suggests that the defendants must also demonstrate that the contract provisions and steps taken to implement them were "intimately related" to the object of collective bargaining thought at the time to be legitimate, and went no further in imposing restraints in the secondary market than was reasonably necessary to accomplish it. Thus our test for the collective bargaining exemption defense to § 4 liability is conjunctive, and objective, and the defendants have the burden on all elements of going forward and of persuasion. The limited § 4 exemption defense we now recognize obviously is unavailable to defendants shown to have acted with the predatory intent

against secondary targets referred to in *Pennington* and *Allen Bradley*.

The district court did not consider the summary judgment record in light of the possible § 4 exemption defense we have posited. On this appeal it is inappropriate that we decide its availability, since neither the parties nor the district court focused on the fact issues possibly relevant to it. The defendants' burden of proving lack of foreseeability is formidable, considering the NLRB decision in *International Longshoremen's Assn., Local 1248 (U.S. Naval Supply Center)*, 195 N.L.R.B. 273 (1972), which held that the Rules were illegal over a year before the Dublin meeting. Nevertheless, they may be able to establish that a factfinder could believe that the *Naval Supply Center* warning should not have alerted reasonable collective bargainers to a § 8(b)(4) and § 8(e) risk. Moreover, while the provisions in the Dublin Supplement requiring the total withholding of containers from Conex and Twin seem overbroad when compared with the supposed ILA object of preserving the work of stuffing LCL and LTL freight originating with shippers close to the Port, it is at least conceivable that a convincing justification for all the boycott provisions of the Dublin Supplement can be successfully advanced. Thus a remand is required for the determination of the availability of the limited defense to § 4 liability which we have here announced. If the district court concludes that material issues of fact remain regarding both of its requirements, it may then proceed to a factual hearing. But whether the exemption defense to the § 4 claim is resolved summarily or after a hearing, it must be resolved in the first instance in the district court. A remand is therefore required.

B. The Claim of Per Se Illegality

If the Rules and Dublin Supplement are held to be nonexempt, the issue of the proper standard of antitrust

liability will arise. Conex and Twin contend that if the nonstatutory exemption is unavailable they are entitled to a summary judgment that the Sherman Act was violated. The district court, treating the questions of the labor exemption and the Sherman Act violation as "inseparable," denied it. We hold that the proper method of analysis is to determine the issue of nonstatutory labor exemption separately, as we have done, and then to proceed with conventional antitrust scrutiny of the complaint. The district court also assumed that even if the labor exemption was inapplicable the Rules and steps taken to enforce them must be judged, for antitrust purposes, under a rule of reason standard rather than, as Conex and Twin suggest, as a *per se* violation. The appellants argue that the Rules and Dublin Supplement comprised a *per se* illegal group boycott directed against the LCL and LTL consolidators. We agree.

The defendants suggest that the trend in the caselaw is to apply the "rule of reason" to concerted refusals to deal. Not all concerted refusals to deal have been held *per se* illegal. Yet in a core group of situations group boycotts have been held to be *per se* violations of the Sherman Act. The Court has condemned as *per se* violations: (1) horizontal combinations of traders at one level of distribution having the purpose of excluding direct competitors from the market, *e.g., Associated Press v. United States,* 326 U.S. 1 (1945); *Eastern States Retail Lumber Dealers' Ass'n v. United States,* 234 U.S. 600 (1914); (2) vertical combinations, designed to exclude from the market direct competitors of some members of the combination, *e.g., Klors, Inc. v. Broadway Hale Stores, Inc.,* 359 U.S. 207 (1959); and (3) coercive combinations aimed at influencing the trade practices of boycott victims. *E.g., Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951); *Fashion Originators' Guild of America v. Federal Trade*

Commission, 312 U.S. 457 (1941). *See generally, E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee,* 467 F.2d 178 (5th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973); Note, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule,* 71 Nw. U.L. Rev. 818, 822-23 (1977).

The Rules and Dublin Supplement have horizontal, vertical, and coercive aspects. Under the Rules, the consolidators were required to accede to stuffing and stripping of their cargoes, and later were denied containers altogether. ILA, the vessel owners and the stevedores agreed to exclude the consolidators from providing services which compete directly with the stevedores and with those vessel owners who provide their own stevedoring services. The vessel owners and the stevedores have agreed with ILA to exclude from competition with ILA longshoremen the Teamster stuffers and strippers employed by the consolidators. The NLRB has determined that ILA's goal was "work acquisition." Where the work that the union seeks to acquire is being performed by the union's direct competitors, here the Teamsters, the union's efforts clearly were directed toward the elimination of Teamster competition. ILA, the vessel owners, and the stevedores agreed to coerce the consolidators into changing their method of operation by allowing their containers to be stuffed and stripped at the docks. In every aspect, the anticompetitive effect of this arrangement is clear. The Rules and the Dublin Supplement wholly bar the consolidators from providing their lower cost services to the shipping market between the Port and Puerto Rico. Nor is there any suggestion in the record that the application of the Rules will in the long run have procompetitive rather than anticompetitive effects. In sum, the Rules and Dublin Supplement are "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the in-

dustry is needed to establish their illegality." *Nat'l Society of Professional Eng'rs v. United States,* 435 U.S. 679 (1978).

The defendants also contend that a finding of *per se* illegality is not possible on this record because there is "no showing that the defendants had an anticompetitive intent to exclude plaintiffs from the market or to accomplish any other anticompetitive purpose." NYSA Brief at 43. They point out that the record contains evidence that the consolidators were valued customers of the carrier defendants, and that those defendants made a serious effort to maintain business relations with Conex and Twin even in the face of ILA resistance. The appellees' argument, however, does not accurately reflect the role of intent in civil antitrust cases. If a *per se* violation has been established, the court will already have found that "the nature and *necessary effect*" of the challenged conduct is "plainly anticompetitive." *National Society of Professional Eng'rs v. United States, supra,* 46 U.S.L.W. at 4359 (emphasis added). Once that fact has been established, all that need be shown is that the charged anticompetitive acts were in fact performed by the defendant. *United States v. United States Gypsum Co.,* 46 U.S.L.W. 4937, 4943 & n.18 (U.S. June 29, 1978). A showing of a specific intent to harm one's competitors or restrain competition need not be shown. *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 614 (1953). Here the "necessary effect" of the container boycott was to drive the plaintiff consolidators from the New York to Puerto Rico shipping market. No further showing of intent is required.

In the alternative the appellees and the dissenting opinion urge that, at least in the context of labor agreements, the *per se* approach should never be applied. The principal support for that view is Professor Handler's statement that "[a] fair reading of *Jewel Tea* satisfie[d him]

that the court intended that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust." Handler, *Labor and Antitrust: A Bit of History,* 40 Antitrust L.J. 233, 239-40 (1971). *See also Commerce Tankers v. National Maritime Union,* 553 F.2d 793, 802 n.8, 804 n.4 (2d Cir.), *cert. denied,* 434 U.S. 923 (1977). Mindful as we are of Professor Handler's expertise in both the labor and antitrust fields, we do not agree with his approach. Certainly we find no support for it in either the *Jewel Tea* or *Pennington* opinions. Indeed, the three groups of Justices in those cases, while they diverged widely on other issues, appear to have agreed that "settled antitrust principles" would be "appropriate and applicable" to activity found to be non-exempt. *United Mineworkers v. Pennington, supra,* 381 U.S. at 715 (Goldberg, J. dissenting); *Meatcutters v. Jewel Tea, supra,* 381 U.S. at 693 n.6 (White, J.); *id.* at 736-37 (Douglas, J. dissenting). Those "settled" principles include the *per se* rule, where the facts warrant its application. The Supreme Court's intimations thus do not support Professor Handler's view. Moreover, once a court has concluded that the labor exemption does not shield anticompetitive conduct, application of the rule of reason is redundant. The justification offered for application of the rule of reason is the need to recognize, in the antitrust context, labor's legitimate interest in the collective bargaining process. That interest, however, is precisely the same one that must be taken into account in determining the scope of the non-statutory labor exemption. A holding that the exemption does not apply embodies a judgment that considerations of labor policy are outweighed by the anticompetitive dangers posed by the challenged restraint. The proposed use of the rule of reason would, therefore, simply be an invitation to the court or jury to reweigh under a different label the question of the nonstatutory

exemption. The appellees have suggested no reason why a second such inquiry is necessary or appropriate.

Further, we think that reliance upon broad "public interest" considerations like the advancement of labor policy as a ground for application of the rule of reason is barred by the view of that rule adopted by the Court in *Nat'l Society of Professional Eng'rs v. United States, supra.* As the Court stated there:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. *Instead, it focuses directly on the challenged restraint's impact on competitive conditions.*

435 U.S. at 688 (emphasis added). Later in the opinion Justice Stevens repeated the same theme even more forcefully:

> [T]he purpose of both [rule of reason and *per se*] analysis is to form a judgment about the competitive signifiance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Id. at 692 (footnote omitted). Since the labor policy arguments advanced to support the application of the rule of reason do not relate to the pro-competitive impact of the Rules on Containers and the Dublin Supplement in the shipping market, they cannot remove this boycott from the category of *per se* violations.[18]

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[18] Even if the rule of reason were to be applied here, the parties have suggested no pro-competitive effects which would justify the challenged restraints under a rule of reason analysis.

Two additional points made by the dissent deserve comment. One is the suggestion that the Dublin Supplement is not a group boycott arrangement to which the *per se* rule should apply because "the union is not a competitor of the shipping association or the stevedoring companies." Dissenting Opinion at 65. That suggestion assumes that the *per se* ban on group boycotts applies only to horizontal competitors. *Klor's Inc. v. Broadway Hale Stores, Inc., supra,* disposes of the question, since Broadway Hale, like the ILA here, was not a competitor of the wholesaler parties with whom it conspired. Like the stevedores, however, Broadway Hale was a competitor of the boycott target. The dissent's other point is that by applying a *per se* rule to employee-labor union boycotts we are somehow giving the union lesser rights than political, religious, racial, or consumer groups which may try to advance their goals by boycott activity. Antitrust regulation of political or religious boycotts may raise important first amendment questions. *See* Note, *Political Boycott Activity and the First Amendment,* 91 Harv. L. Rev. 659 (1978). Those questions are absent here, just as they are absent when commercial organizations, which also have first amendment rights, step over the line drawn by Congress in the Sherman Act. In this case Congress has drawn the line between legitimate and illegitimate labor organization activities in §§ 8(b) and 8(e). We are not prepared to hold that those statutes violate the first amendment. Congress has made no similar statement of policy with respect to political or religious boycotts, and the application of a *per se* rule here is in no way analogous to its application in those contexts.

Thus we hold that the district court erred in rejecting the contention of Conex and Twin that the enforcement of the Dublin Supplement, if non-exempt, was a group boycott and a *per se* violation of the Sherman Act.

C. Election of Remedies

Faced with enforecement of the Dublin Supplement, Conex and Twin not only filed unfair practice charges with the NLRB, but also filed complaints with the Federal Maritime Commission (FMC) against the vessel owners seeking damages under § 22 of the Shipping Act of 1916, 46 U.S.C. § 821. The FMC complaints were voluntarily withdrawn without prejudice about the time the instant complaints were filed.[19] The appellees now argue that the filing of complaints with the FMC concerning the enforcement of the Dublin Supplement was an irrevocable election of remedies which as a matter of law bars their claim under the Clayton Act. Nothing in either the Shipping Act or the Clayton Act so provides.[20]

In support of their argument the defendants rely upon *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 224 (1966). There the Court held that although the FMC had jurisdiction over practices unlawful under the Shipping Act, that statute, unlike the Interstate Commerce Act, did not vest exclusive jurisdiction for reparations litigation in the administrative agency. The defendants in an antitrust suit had urged that by authorizing the FMC to approve conference shipping rates Congress had precluded the application of the antitrust laws to the shipping industry. The Court rejected this contention. Recognizing that a stay of the antitrust action might in some cases be

[19] Conex and Twin settled the FMC proceeding with TTT, the third vessel owner and dismissed the FMC complaint against it with prejudice. Twin settled its FMC complaint against Seatrain and dismissed its complaint with prejudice as to that defendant only. Whether Seatrain is entitled to a credit for whatever it paid in reparation for violations of the Shipping Act should Twin establish damage to its business or property is an issue not presented on this appeal.

[20] *Compare, e.g.,* The Interstate Commerce Act, 49 U.S.C. § 9.

appropriate while issues under the Shipping Act were litigated before the FMC, Chief Justice Warren wrote:

> Petitioner's failure to seek Shipping Act reparations does not affect its rights under the antitrust laws. The rights which petitioner claims under the antitrust laws are entirely collateral to those which petitioner might have sought under the Shipping Act. This does not suggest that petitioner might have sought recovery under both, but petitioner did have its choice.

383 U.S. at 224. The appellees would have us read the last quoted sentence as establishing a rule that the FMC filing was an irrevocable election of remedies. But Chief Justice Warren neither said nor suggested any such rule, and no considerations of policy support it. The purposes of an election of remedies—prevention of double recovery, forum shopping, and harassment of defendants by dual proceedings—are adequately served by a rule that plaintiffs may not pursue both their Shipping Act and Clayton Act claims to a decision on the merits. *Cf. Abdallah v. Abdallah,* 359 F.2d 170, 175 (3d Cir. 1966). It would be both formalistic and unfair to hold that the filing and voluntary dismissal without prejudice of a complaint seeking Shipping Act reparations is a bar to the § 4 Clayton Act remedy, and we decline to do so.

D. Illegality

The vessel owners and stevedores join ILA in the assertion that because Conex and Twin lacked ICC permits they cannot recover damages. The reasoning of Part IV. C., *supra,* is applicable here, and will not be repeated. We do note, however, that the case for application of an illegality defense to the § 4 Clayton Act claim is by virtue of antitrust caselaw even weaker than that for its application under § 303(b). In *Perma Life Mufflers, Inc. v. Int'l Parts*

Corp., 392 U.S. 134 (1968), the Court held that the defense of *peri delicto* was not a bar to an antitrust suit by distributors challenging restrictive provisions in agreements to which they were parties, except when it could be said that the plaintiffs, acting in their own self interest, were equally responsible with the defendants for the antitrust violations. While *Perma Life* dealt only with illegality alleged to be a concurrent violation of the antitrust laws, it has been understood to have abolished the defense of illegality even when the plaintiff's wrongdoing is unrelated to antitrust policy. *E.g., Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425 (10th Cir. 1977) (absence of a liquor license); *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977) (absence of state and federal beer wholesaler permits); *Memorex Corp. v. IBM Corp.*, 555 F.2d 1379 (9th Cir. 1977) (theft of trade secrets); *Health Corp. of America, Inc. v. New Jersey Dental Ass'n*, 424 F. Supp. 931 (D. N.J. 1977), *mandamus denied without opinion sub nom. New Jersey Dental Ass'n v. Brotman*, No. 77-1268 (3d Cir. Feb. 24, 1977), *mandamus denied*, 434 U.S. 812 (1977) (violation of state health care regulations). *Contra, Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co.*, 440 F.2d 36 (10th Cir.), *cert. denied*, 404 U.S. 857 (1971).

The authorities rejecting illegality defenses not directly related to the antitrust policy in issue in the plaintiff's case recognize the inappropriateness of requiring that the federal antitrust enforcement policy yield to unrelated regulatory policies, state or federal. The ICC permit requirements, which so often are administered to protect existing carriers from excessive competition, have nothing to do with the pro-competitive policies of the antitrust laws. As we observed in Part IV.C., *supra*, the ICC has sanctioning authority for the vindication of the public policies which are its responsibility. Additional

enforcement at the expense of antitrust policy would not, in view of *Perma Life*, be appropriate.[21]

E. Equitable Estoppel

The vessel owners and stevedores join ILA in pleading equitable estoppel on the same theory that ILA asserts in defense to the § 303(b) count. For the reasons set forth in Part IV.D., *supra*, we hold that it is not a legally sufficient defense to Count I.

F. Nonparticipation of the Stevedore Defendants

The final defense to summary judgment, advanced only by the stevedore defendants, is that they should not be held liable for the adoption and enforcement of the Dublin Supplement, even though they are members of NYSA and are parties to the collective bargaining agreement with ILA, because the record does not contain the clear proof of their complicity required by § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106. Section 6, which applies both in civil and criminal actions, provides that:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

The "clear proof" standard has been applied by the Supreme Court in an antitrust enforcement context.

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[21] The appellees also rely on *Maltz v. Sax*, 134 F.2d 2 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943). We do not believe that holding survives *Perma Life*.

Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947).

We assume for purposes of this appeal that the acts complained of in Count I qualify as a labor dispute for purposes of § 6, and thus that the clear proof standard applies with respect to the authority of NYSA to act on behalf of the stevedores. As to other facts, such as the existence of a contract or combination, and the injury to the consolidators' business or property, the ordinary preponderance of the evidence test governs. *Ramsey v. United Mine Workers,* 401 U.S. 302, 308-11 (1971). But while § 6 binds the federal courts to a clear proof standard on the authority question, neither its text nor any judicial construction that has been called to our attention suggests that it precludes summary judgment on that question. Indeed the standard of Fed. R. Civ. P. 56(c)—the absence of a genuine issue as to any material fact—is higher than the clear proof standard imposed by § 6, which merely instructs the factfinder how to resolve genuine fact issues.

Contrary to the stevedores' argument, we find no genuine issue of material fact as to the authority of NYSA to act for them in negotiating and implementing the Dublin Supplement. All the stevedore defendants are members of NYSA and it bargains collectively on their behalf with ILA, which represents their longshoremen employees. The NYSA bylaws provide that any agreement negotiated by it is binding on all members unless within fourteen days members refuse to subscribe. The stevedores did not refuse to subscribe to, and thus became parties to, the Dublin Supplement. Any suggestion that they lacked knowledge of the charged group boycott is negated by the letter of April 13, 1973, directed to all NYSA members, including the stevedores, identifying Conex and Twin as violators of the Rules and activating the boycott provisions of the Dublin Supplement. No answering affidavits were submitted suggesting that either at the time of its execution or at the time of its implementation the stevedores took any action to disassociate themselves from the unlawful agreement to which they were parties. There is, therefore, no genuine issue of material fact as to the authority of NYSA to act for all its members, including the stevedores, in negotiating and implementing the contract undertaking a group boycott. The sole question is whether, having become a party to that contract with full knowledge of its contents, they are liable for the injury to the consolidators' business and property resulting from its implementation. We hold that they are.

VI. Conclusion

The order appealed from to the extent that it denied the motions of Conex and Twin for partial summary judgment of liability against ILA on Count III will be reversed, and the case remanded for the entry of such a judgment and for a trial on damages on that Count. Insofar as that order denied summary judgment on Count I against ILA, NYSA and the vessel owners it will be affirmed and the case will be remanded to the district court for further proceedings respecting the availability of the labor exemption defense to the § 4 Clayton Act claim which we have announced, and for a trial on damages on that Count if that defense should prove to be unavailing. Each party shall bear its own costs.

Weis, *Circuit Judge,* concurring and dissenting.

Although I concur with the majority's disposition of most of the issues in this case,[1] I am unable to agree that

[1] I do not dispute that collateral estoppel, to the extent it establishes violations of §§ 8(b)(4) and 8(e), is applicable here. I do

(footnote continued on following page)

on remand, if the challenged conduct is found to be non-exempt, a per se approach would be proper. Determining the applicability of the labor exemption and choosing the appropriate level of antitrust scrutiny are discrete issues. Accordingly, if it is concluded that the exemption does not apply, consideration must then be given to utilizing a full rule of reason inquiry or applying the abbreviated per se approach.

The fact that the labor exemption does not insulate certain conduct does not make it a violation of the antitrust laws, but simply means that the activity is subject to scrutiny under those statutes. This has been made clear by the Supreme Court decisions discussing the labor exemption. In each instance, the Court has carefully separated the exemption inquiry from the ultimate liability determination. *See Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616, 637 (1975); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676, 693 (1965) (opinion of White, J.); *United Mine Workers v. Pennington,* 381 U.S. 657, 661, 669 (1965) (opinion of White, J.).

I start with the basic proposition that the rule of reason is the prevailing standard of analysis. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49 (1977); *Sitkin Smelting & Refining Co. v. FMC Corp.,* 575 F.2d 440, 446 (3d Cir. 1978), and that the per se standard is

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not, however, agree with all of the dictum in the majority opinion. I note particularly that in International Bhd. of Teamsters v. Daniel, —— U.S. —— 47 U.S.L.W. 4135 (U.S. Jan. 16, 1979), the Supreme Court cautioned that the weight to be given an administrative agency's interpretation of the statute under which it operates must be limited by a court's obligation to honor the clear meaning of the legislation. I also read Parklane Hosiery Co. v. Shore, —— U.S. ——, 47 U.S.L.W. 4079 (U.S. Jan. 9, 1979), as permitting scrutiny of administrative procedures before according collateral estoppel effect to agency decisions.

applicable only in limited situations. As the Court explained in *Northern Pacific Railway v. United States,* 356 U.S. 1, 5 (1958):

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

The majority opinion correctly points out that some refusals to deal have been classified as per se violations. All of the cited cases, however, reviewed fact situations involving business competitors. The Supreme Court has never held that all boycotts, even those involving noncompetitors are per se violations, nor is there any present indication that that position will prevail.[2] Indeed, in *De Filippo v. Ford Motor Co.,* 516 F.2d 1313, 1317-18 (3d Cir. 1975), we cautioned that a consequence of an overreliance on the "boycott" label would be the indiscriminate extension of the per se principle. The case at bar does not represent a classic commercial boycott because the union is not a competitor of the shipping association or of the stevedoring companies. Its aim was not the elimination of competition but work preservation or acquisition. Concededly, a boycott may include noncompetitors and be a violation of the Clayton Act, but that does not answer the question whether a per se violation is involved. *See St.*

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[2] National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), though emphasizing the anti-competitive focus of the rule of reason, was interpreting that very precept, not announcing a new per se classification. That opinion, therefore, is of no relevance in determining as an initial matter which mode of antitrust analysis to employ. *See generally* Handler, Antitrust—1978, 78 Colum. L. Rev. 1363, 1364-74 (1978).

Paul Fire & Marine Insurance Co. v. Barry, —— U.S. ——, 46 U.S.L.W. 4971 (U.S. June 29, 1978).[3]

A political, religious, racial, or consumer group that promotes a boycott of particular products to enforce its aims would not be guilty of a per se violation. In these cases, although the refusal to deal may be intended to inflict some injury upon the object of the boycott, the target is not a competitor of those who have actively urged the restraint. *See* L. Sullivan, Antitrust § 92 (1977); Note, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule,* 71 Nw. U.L. Rev. 818, 830-32 (1977). *See generally* McCormick, *Group Boycotts—Per Se or Not Per Se, That is the Question,* 7 Seton Hall L. Rev. 703 (1976).

The majority argues that permitting a rule of reason inquiry after a finding of no labor exemption would be redundant. But if a boycott by a political, religious, racial, or consumer group is to be subjected to rule of reason scrutiny, it is difficult to understand why that procedure should be denied a labor union simply because some—but not necessarily all—of the pertinent factors have been resolved in the labor exemption examination. The rule of reason analysis does not duplicate the exemption inquiry in its entirety and should not be forsaken merely because there might be some overlap. A union should not be singled out in a manner that would deny it all the opportunities for defense afforded other noncompetitor participants in similar boycotts. Indeed, I find myself in agreement with Professor Handler's view that an automatic finding of antitrust liability after a determination that union activity is nonexempt "would be a

[3] The courts of appeals have favored the rule of reason in noncompetitor boycott situations. *See* the cases collected in Smith v. Pro Football, Inc., —— F.2d —— (D.C. Cir. No. 76-2135 Nov. 9, 1978).

per se approach with a vengeance." Handler, *Labor and Antitrust: A Bit of History,* 40 Antitrust L.J. 233, 239 (1971). Moreover, some consideration should be given to the other defendants' contentions that the restraint was forced upon them through union pressure and not through any desire of their own.

Perhaps none of the defendants can satisfy the rule of reason analysis, but it is premature on this record to decide whether the restraint violates the antitrust laws. That determination must be made initially by the district court after reviewing all relevant considerations. A shortcut is not appropriate in this case. Accordingly, I would remand to the district court with directions that if the labor exemption is not found to be applicable, the rule of reason should be applied to the antitrust claims.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment of Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1529

CONSOLIDATED EXPRESS, INC.,
Appellant,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.

(D.C. CIVIL No. 76-1645)

No. 78-1530

TWIN EXPRESS, INC.,
Appellant,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.

(D.C. CIVIL No. 77-156)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix B—Judgment of Court of Appeals.

Present: SEITZ, *Chief Judge* and GIBBONS and WEIS, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on November 14, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court filed December 19, 1977, as amended by the order of the said District Court filed February 23, 1978, to the extent that the said order denied the motions of Conex and Twin for partial summary judgment of liability against ILA on Count III be, and the same is hereby reversed, and the cause remanded for entry of such a judgment and for a trial on damages on that Count. Insofar as the said order of the said District Court denied summary judgment on Count I against ILA, NYSA and the vessel owners, the said order be, and the same is hereby affirmed and the cause remanded to the said District Court for further proceedings respecting the availability of the labor exemption defense to the Section 4 Clayton Act claim which this Court has announced, and for a trial on damages on that Count if that defense should prove to be unavailing, all of the above in accordance with the opinion of this Court. Each party shall bear its own costs.

ATTEST:

THOMAS F. QUINN
Clerk

April 16, 1979

APPENDIX C

Opinion of District Court.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 76-1645

CONSOLIDATED EXPRESS, INC.,

Appellant,

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.,

Defendants.

Civil Action No. 77-156

TWIN EXPRESS, INC.,

Appellant,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN W. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; and UNIVERSAL MARITIME SERVICES CORP.,

Defendants.

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(Filed Dec. 19, 1977, as amended May 11, 1978)

STERN, *District Judge*

I. INTRODUCTION

In this lawsuit, plaintiff Consolidated Express (hereinafter Conex) seeks to recover money damages for injuries it claims to have suffered by reason of the implementation of the infamous 1969 Rules on Containers, a collectively-bargained response to the perceived threat to waterfront labor posed by technological change in the shipping industry.[1]

Since World War II, the introduction of increasingly large containers has enabled the shipping industry gradually to replace piece-by-piece loading and unloading work performed by the longshoremen on the piers with block handling of cargo. By use of mammoth containers, shipments of diverse firms can be consolidated into one container which can be "stuffed" far from the waterfront. The containers are then sent to the piers where they are loaded onto waiting ships. This innovation has increased productivity, but has produced decline in demand for the services of the members of the defendant International Longshoremen's Association (ILA).

In 1958, the ILA protested the use of containers and commenced a strike against defendant New York Shipping Association (NYSA). In the contract adopted in 1959, the

[1] A complaint has also been filed by Twin Express, Inc., against the same defendants (except Twin does not sue Seatrain) arising out of the same facts. The suits have been consolidated for trial on the issue of liability. Twin has joined in Conex's motion for summary judgment, and both plaintiffs and all defendants have agreed to be bound by the Court's determination of this motion. Twin, like Conex, is a consolidator and corporation of Puerto Rico. Although the discussion in the text will refer to Conex, it applies equally to the Twin suit, unless otherwise noted.

union conceded that "any employer shall have the right to use any and all types of containers without restrictions."[2]

In the following decade, fully containerized ships were introduced and the use of containers increased dramatically. The loss of work opportunities occasioned by these developments led the ILA to negotiate the "Rules of Containers" in 1969. By these agreements, the NYSA guaranteed that all cargo lots which had been of less than a container size but which had been consolidated with other lots into one container would be stripped when the container arrived on the docks by longshoremen on the dock, if the cargo had originated from or was to be shipped to a point within 50 miles of the dock. The Rules provided for a penalty against the carrier in the amount of $250 per container for any container which went through dockside without being

[2] Section 8 of the 1959 memorandum of settlement was entitled "Containers-Dravo Size or Larger" and provided:

> a. Any employer shall have the right to use any and all type of containers without restriction or stripping by the union.
>
> b. The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached shall submit to arbitration . . . the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor, such submission to be within 30 days thereafter.
>
> c. Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

Notwithstanding this concession, union objections to container use continued and there is much support in the record for the view that containers did not move freely through the ports. See Affidavit of James M. Dickman, Apr. 12, 1977; Affidavit of Thomas W. Gleason, May 1, 1977.

stripped and stuffed in accordance with the Rules.[3] In 1970, the penalty was increased to $1,000 per violation. Disputes continued and, in 1973, CONASA (an organization of shipping associations, including NYSA, with authority to negotiate) and the ILA met and entered into the "Dublin Supplement" which provides, in part, as follows:

Enforcement of Rules on Containers.

* * *

1. (a) All outbound (export) consolidated or LTL container loads (Rule 1 containers) shall be stripped from the container at pier by deepsea ILA labor and cargo shall be stuffed into a different container for loading aboard ship.

1. (b) All inbound (import) consolidated or LTL cargo (Rule 1 containers) for distribution shall be

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[3] "Rules on Containers":

"Rule 1. Definitions and rule as to containers covered.

"Stuffing—Means the act of placing cargo into a container.

"Stripping—Means the act of removing cargo from a container.

"Loading—Means the act of placing containers aboard a vessel.

"Discharging—Means the act of removing containers from a vessel.

"These provisions relate solely to containers meeting each and all of the following criteria:

"(a) Containers owned or leased by employer-members (including containers on wheels) which contain LTL loads or consolidated full container loads.

"(b) Such containers which come from or go to any person (including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

(Footnote continued on following page)

stripped from the container and the cargo placed on the pier where it will be delivered and picked up by each consignee.

2. No carrier or direct employer shall supply its containers to any facilities operated in violation of the

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"(c) Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

"Rule 2. Rule of stripping and stuffing applies to such containers.

"A container which comes within each and all of the criteria set forth in Rule 1 above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LTL loads or Consolidated Container loads of mail, of household goods with no other type of cargo in the container, and of personnel effects of military personnel shall be exempt from the rule of stripping and stuffing.

"Rule 3. Rules on No Avoidance or Evasion.

* * *

"(c) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules, then the steamship carrier shall pay, to the joint Container Royalty Fund liquidated damages of $250 per container which should have been stuffed or stripped. Such damages shall be used for the same purposes as the first Container Royalty is used in each port. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in (g) below, the ILA shall have the right to stop working such carrier containers until such damages are paid."

Rules on Containers including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder who is either a consolidator or a distributor. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all containers be stuffed or stripped at a waterfront facility (pier or dock) where vessels normally dock.

A list shall be maintained of consolidation and distribution stations which are operated in violation of the Rules for the information of all carriers and direct employers. Any container consolidated at or distributed from such facilities shall be deemed a violation and subject to the rules on stuffing and stripping.

Consolidated Express, a Puerto Rican corporation, is a non-vessel owning common carrier engaged in the business of containerizing less than container load (LCL) or less than trailer load (LTL) cargo for shipment between Puerto Rico and its inland facilities located within 50 miles of the Port of New York. In the trade, plaintiff is known as a "consolidator," that is, it is in the business of handling LCL or LTL goods for customers wishing to ship such goods. Consolidators "unitize" or consolidate the crates of several customers into large containers provided by the shipping companies. The consolidators pack their customers' crates into containers, and then truck them to pierside facilities where they are loaded onto ships.

Defendant New York Shipping Association is an association of employers engaged in various operations related to the shipment of freight into and out of the Port of New York. On behalf of its member-employees, NYSA conducts collective bargaining negotiations and enters into collective bargaining agreements with labor organizations, including

defendant ILA which represents the employees of NYSA's member employers. Defendants Sea-Land and Seatrain are common carriers by water. As part of their business, they furnish containers and trailers, terminal facilities, and cargo space on vessels which they own or lease. They are also in the business of providing stevedoring services for cargo shipped aboard their vessels. Such services include loading and unloading cargo on and off their vessels and receiving delivery of cargo at dockside.

Defendants International Terminal Operating Co., Inc., John M. McGrath Corp., Pittston Stevedoring Corp., United Terminal Corp., and Universal Maritime Services Corp. are members of the NYSA. Each is engaged, in part, in the business of providing stevedoring services as described above.

On June 1, 1973, Conex filed charges with the National Labor Relations Board alleging that the ILA had violated § 8(b)(4)(ii)(B) of the National Labor Relations Act, which forbids union activity which forces any employer "to cease doing business"[4] with any other employer, and

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[4] Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(ii)(B), provides in pertinent part:

> (b) It shall be an unfair labor practice for a labor organization or its agent—
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> • • •
>
> (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is—
>
> (B) Forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . Provided that nothing contained in Clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

that the ILA and NYSA had violated § 8(e)[5] which prohibits agreements requiring such a cessation. Complaints issued and the General Counsel, pursuant to § 10(l) sought preliminary injunctive relief against the union and the shipping association.

The complaint came before Judge Lacey who granted the petition for a preliminary injunction. *Balicer v. ILA,* 364 F.Supp. 205 (D.N.J. 1973). Testimony of nine witnesses before Judge Lacey consumed seven days and 1,200 pages of transcript.[6] Noting the limited role of the Court in a 10(l) proceeding, Judge Lacey held that the NLRB's legal theory—that the challenged activities were impermissible work reacquisition—was substantial, and that the issuance of a temporary injunction was "just and proper." The Court of Appeals for the Third Circuit affirmed. *Balicer v. ILA,* 491 F.2d 748 (3rd Cir. 1973) (mem.).

The case was then submitted to an Administrative Law Judge on the basis of a stipulated record consisting of the record of the injunction proceeding before Judge Lacey, including extensive documentary evidence, and supplementary affidavits. The Administrative Law Judge determined that the ILA boycott of Conex and the contractual

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[5] Section 8(e), 29 U.S.C. § 158(e) (1970) reads, in pertinent part:

> It shall be an unfair labor practice for any labor organization to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person.

[6] Called as witnesses for NYSA were its president, James J. Dickman; the vice-president in charge of operations of ITT (a NYSA member with whom Conex has settled its claims); Sea-Land's manager of cargo operations; NYSA's administrative director; and Sea-Land's chairman of the board and chief executive officer. The ILA called Thomas Gleason, its international president since 1963, and in the industry since 1915.

agreement between the union and the shipping association were addressed to the labor-management relations of the NYSA employer-members vis-a-vis their own employees. He held that the activities were therefore protected "primary conduct."

The NLRB reversed. *Consolidated Express, Inc.,* 221 NLRB No. 144 (1975). The Board found the agreement to be improper under § 8(e) because its objective was to force the NYSA to cease doing business with the consolidators. The NLRB rejected the argument that the contract constituted a valid effort by the ILA to preserve for its members a type of work which they had historically performed. It reasoned that the "work in controversy" was that work performed by the consolidators at their off-pier facilities, not the traditional cargo handling done at dockside by longshoremen. The agreement thus could not be viewed as work preservation lawful under the Supreme Court decision in *National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed. 2d 357 (1967). Moreover, reasoned the Board, even assuming that the ILA once had a valid claim to the strip and stuff work, that claim had been abandoned in the 1959 ILA-NYSA agreement. Finally, the Board considered the "economic personality of the industry" and noted that the absence of a clear distinction between strip and stuff work and the work related to preparing containers for shipment could lead to a future ILA claim to all such work with "enormous impact on the shipping industry". The Board further ruled that the union's actions in enforcing the agreement were unfair labor practices under § 8(b)(4b)(ii)(B).

The Court of Appeals for the Second Circuit found that the Board's order was supported by substantial evidence and sustained it. *ILA* v. *NLRB,* 537 F.2d 706 (2nd Cir. 1976), *cert. denied,* 429 U.S. 1041, 97 S.Ct. 740, 50 L.Ed. 2d 753 (1977). Judge Wyzanski, writing for the Court, prem-

ised enforcement of the order on the Board's finding that there was no valid work preservation agreement.[7] It is against this backdrop that plaintiff's motion for summary judgment must be evaluated.

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[7] The critical portion of the Second Circuit opinion reads as follows:

> The following parts of [the NLRB] opinion seem to us controlling and convincing.
>
> > . . . the disposition of this case turns on whether ILA's activities and its contractual agreements with NYSA had primary or secondary objectives. If ILA's activities and its agreements with NYSA were designed to preserve work to which ILA-represented employees working in the Port of New York were entitled, then both the activities and the contractual arrangements would be primary in purpose and, therefore, would not be unlawful. However, if ILA's real object was to obtain either work traditionally performed by employees not represented by ILA or work to which ILA had abandoned all claims, then the pressures on NYSA members and the contractual arrangements would have a secondary object and would violate Section 8(b)(4)(ii)(B) and 8(e), respectively. As the United States Supreme Court instructed in National Woodwork Manufacturers Association v. N.L.R.B., "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees."
>
> * * *
>
> . . . in order to properly evaluate the validity of ILA's claim to the work, "it is essential to define with some precision the work in controversy since that is the predicate upon which the issue of work preservation must turn." It is clear from the record that the work in controversy here is the LCL and LTL container work performed by Consolidated and Twin at their own off-pier premises. It is with this precise work in mind that the contentions of the parties must be evaluated.
>
> The traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.
>
> Similarly, for many years, maritime cargo has been

(footnote continued on following page)

Plaintiff has moved for partial summary judgment on the issue of defendants' liability under Counts I and III of the complaint. Count I charges all defendants with a group

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> sorted and consolidated off the docks by companies employing teamsters and unrepresented employees. With the advent of vessels designed exclusively to carry the large containers presently in use, these consolidating companies, such as Consolidated and Twin, have continued to consolidate shipments into containers prior to their placement aboard the vessels. The consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship. Furthermore, they perform this consolidation work at their own off-pier premises, with their own employees who are outside the unit represented by ILA, and who fall within the coverage of separate collective-bargaining agreements, under which they are represented by other labor organizations. It is clear, therefore, that Consolidated and Twin have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy.
>
> From the foregoing and the record as a whole, it is clear that the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises. It does not fall within ILA's traditional role to engage in make-work measures by insisting upon stripping and stuffing cargo merely because that cargo was originally containerized by nonunit personnel. Yet, ILA's demands here could only be met if the work traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA.

Judge Feinberg dissented, arguing that the Board had erred in identifying the work in controversy. He maintained that the work which could be preserved without violating 8(e) must be defined as the generic category of preparation of cargo for shipment, not as the specific tasks currently being performed by the longshoremen. In his view, under the Board's and the majority theory, work preservation agreements would be virtually precluded where it could be established that other employees at other sites were doing or had done the work for which protection was sought.

boycott or concerted refusal to deal, alleged to be *per se* violations of §§ 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1 and 3. Count III seeks damages against defendant ILA under § 303(b) of the Labor Management Relations Act, 29 U.S.C. § 187(b) for its violation of § 303(a) of that Act, 29 U.S.C. § 187(a).

In brief, plaintiff argues that the 1975 determination by the National Labor Relations Board that the Rules on Containers and the enforcement thereof constituted unfair labor practices be given collateral estoppel effect and that the Board's determination is dispositive of all issues raised in this lawsuit. All defendants oppose the application of collateral estoppel in the context of this lawsuit and assert a number of affirmative defenses. Plaintiff insists that each and every defense is insufficient as a matter of law.

II. Count III—Unfair Labor Practice Claim

Under Count III, plaintiff seeks damages from the ILA under § 303(b) of the Labor Management Relations Act, 29 U.S.C. § 187(b) for its violations of § 303(a) of that Act, 29 U.S.C. § 187(a). Section 303 provides:

> (a) It shall be unlawful, for the purpose of this section only, . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title [§ 8(b)(4) of the NLRA].
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) . . . may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(ii)(B), provides, in pertinent part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> . . .
>
> (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is—
>
> (B) Forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other person, . . . Provided that nothing contained in this Clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

Conex maintains that the union's commission of an unfair labor practice within the meaning of § 8(b)(4) was established in the NLRB proceedings and that the ILA is collaterally estopped from relitigating the facts underlying the Board's determination or the legal conclusions which it reached. The ILA argues that collateral estoppel does not apply under the circumstances present in this case. It also argues that plaintiff's own illegal activities preclude recovery. It contends that Conex's claims are barred by the statute of limitations. And it raises a number of equitable defenses.

A. Collateral Estoppel

The parties agree that *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966) establishes the criteria for application of the doctrine of collateral estoppel to an administrative determination. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact

properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *Id.*, at 422, 86 S.Ct., at 1560.

Section 303(a) of the Labor Management Relations Act requires a determination of whether the ILA committed an unfair labor practice within the meaning of § 8(b)(4) of the NLRA. *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 72 S.Ct. 235, 96 L.Ed. 275 (1952). The NLRB ruled that the ILA had committed such a forbidden practice. ILA argues, however, that that conclusion should not be binding here. I disagree.

The major thrust of the union's argument is that it did not receive a full and fair hearing before the Board because it was afforded no discovery rights in the Board's proceedings. Acceptance of this theory would, in effect, mean that collateral estoppel could never be applied to an administrative determination; discovery under the federal rules is never available on the administrative level. Moreover, in the context of this litigation, the ILA's claim is particularly unpersuasive. At the lengthy hearing before Judge Lacey, the ILA was represented by counsel and had a full opportunity to call, examine, and cross-examine witnesses and to introduce documentary evidence. As augmented by affidavits, and by agreement of the parties, this was the record upon which the Board made its determination. Appeal of the Board's decision was prosecuted vigorously. Under these circumstances, I must conclude that the ILA had a full and fair opportunity to litigate its claims.

Its contention that "newly discovered evidence" compels a different resolution of the substantive issue is unpersuasive. Even if a different conclusion could be reached if the ILA were permitted a second chance, the policies underlying the doctrine of collateral estoppel—finality to litigation, prevention of needless litigation, avoidance of

unnecessary expenditures of time and money, undesirability of inconsistent adjudications—outweigh the considerations raised by the union. As the Supreme Court has stated:

> After a party has had his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

Stoll v. Gottlieb, 305 U.S. 165, 172, 59 S.Ct. 134, 138, 83 L.Ed. 104 (1938).[8]

The Board's determination that the union had committed an unfair labor practice will therefore be given collateral estoppel effect for purposes of the plaintiff's Section 303 claim.[9] See *International Wire v. Local 38, IBEW*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867, 94 S.Ct.

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[8] The NLRB's definition of the work in controversy, approved by the Second Circuit, has come under critical attack. See Note, *Work Recapture Agreements and Secondary Boycotts: ILA v. NLRB (Consolidated Express)*, 90 Harv.L.Rev. 815 (1977) ("The narrow view adopted in *Consolidated Express, Inc.* would restrict the collective bargaining process, thereby limiting its potential to ease the economic and social tension which accompany technological change.")

The Third Circuit has expressly declined to comment on the validity of the Rules in this Circuit. See *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, 552 F.2d 985 n.5 (3rd Cir. 1977).

[9] ILA charges that the Board's decision was motivated by policy considerations, rather than legal analysis. The Second Circuit, however, expressly based its enforcement of the Board's order on the sufficiency of the record to support the conclusion that the Rules on Containers had no valid work preservation objective. That Court expressly disavowed the Board's "policy" rationale. Moreover, it rejected the Board's finding with respect to "abandonment"—the subject to which the ILA's newly discovered evidence relates.

63, 38 L.Ed.2d 86 (1973); *Texaco Inc. v. Operative Plasterers & Cement Masons International Union,* 472 F.2d 594 (5th Cir.), *cert. denied,* 414 U.S. 1091, 94 S.Ct. 721, 38 L.Ed.2d 548 (1973); *Paramount Transport Systems v. Teamsters Local 150,* 436 F.2d 1064 (9th Cir. 1971); *Painters District Council No. 38 v. Edgewood Contracting Co.,* 416 F.2d 1081 (5th Cir. 1969); *Eazor Express, Inc. v. General Teamsters Local 326,* 388 F.Supp. 1264 (D.Del. 1975); *United Engineers and Constructors, Inc. v. International Brotherhood of Teamsters,* 363 F.Supp. 845 (D.N.J. 1973).

B. Section 303(b) Illegality Defense.

The ILA argues that plaintiff's own wrongdoing bars recovery on its § 303(b) claim. The asserted defense is based on allegations that, during the relevant time period, plaintiff operated as a freight forwarder[10] without holding the license required under Part IV of the Interstate Commerce Act, 49 U.S.C. §§ 1001 *et seq.* Conex, for purposes of this motion, does not deny that it was operating as a freight forwarder without a license.[11] It argues in-

[10] The term "freight forwarder" means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title. 49 U.S.C. § 1002(a)(5).

[11] 49 U.S.C. § 1010 provides, in pertinent part,

(a)(1) No person shall engage in service subject to this chap-

(footnote continued on following page)

stead that the defense of "illegality" is insufficient as a matter of law.

It is well settled that a charging party's violation of an unrelated statute is *not* a defense to the secondary boycott prohibitions of § 8(b)(4)(ii)(B). See, *e.g., NLRB v. Springfield Building & Construction Trades Council,* 262 F.2d 494 (1st Cir. 1958). But a non-defense before the Board is not necessarily a non-defense to a § 303 private damage claim.

Section 303(b) reads, in pertinent part:

> whoever shall be injured in his business or property . . . shall recover the damages by him sustained.

Although the damage action may tend collaterally to serve as a deterrent, Section 303(b) is purely compensatory in nature. See *Teamsters Local 20 v. Morton,* 377

(footnote continued from preceding page)

> ter unless such person holds a permit, issued by the Commission, authorizing such service . . .
>
> (3)(c) The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; . . .

According to the defendants, Conex applied for authority to provide freight forwarding services, but its application was denied by the Interstate Commerce Commission in January of 1971. The Commission's denial was based on Conex's failure to establish that its proposed services would be consistent with the public interest and the national transportation policy. The Commission also indicated that Conex was engaged in services without the required ICC authority. Consolidated Express, Inc., Freight Forwarder Application, ICC Docket FF-384 (Jan. 19, 1971). Exhibit 6 to Benkhardt Affidavit.

The record suggests that Twin Express never applied for an ICC license.

U.S. 252, 260, 84 S.Ct. 1253, 12 L.Ed. 2d 280 (1964); *Sheet Metal Workers, Local 233 v. Atlas Sheet Metal Co.,* 384 F.2d 101 (5th Cir. 1967).

If, as the ILA maintains, Conex's entire freight forwarding business is and was unlawful, Conex would have been, in legal contemplation, incapable of suffering any injury to its "business" by reason of the ILA's unfair labor practices. In slightly different terms, Conex, nonexistent in the eyes of the law, is entitled to no legal protection. Its contracts made in violation of the Interstate Commerce Act would be void and unenforceable. See *Shirks Motor Express Corp. v. Forster T & R Co.,* 214 Md. 18, 133 A.2d 59 (Md. Ct. App. 1957).

Whether the issue is framed in terms of an illegality defense or a lack of standing to sue, the ILA's uncontradicted allegations that Conex was operating in flagrant violation of federal licensing law preclude a grant of summary judgment on the issue of liability under Section 303.

C. Statute of Limitations.

Defendant ILA has also raised a number of issues relating to statute of limitations. Both sides agree that, because Section 303 contains no statute of limitations, state law applies. See *Hyatt Chalet Motels, Inc. v. Carpenters Local 1065,* 430 F.2d 1119 (9th Cir. 1970); *International Union of Operating Engineers v. Fischbach & Moore, Inc.,* 350 F.2d 936 (9th Cir. 1965); *United Mine Workers v. Meadow Creek Coal Co., Inc.,* 263 F.2d 52 (6th Cir.), *cert. denied,* 359 U.S. 1013, 79 S.Ct. 1149, 3 L.Ed. 2d 1038 (1959). Moreover, both sides agree that state law means the law of the forum state, that is, of New Jersey. See *UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed. 2d 192 (1966). At this point, concensus [sic] ends.

The ILA argues that application of state law means application of the whole law of New Jersey, including its choice of law rules. The ILA contends that New Jersey

choice of law principles mandate application of Puerto Rico's one-year statute of limitations. Plaintiff, on the other hand, urges that application of state law in this context means application only of the internal law of the state and that, even if New Jersey choice of law principles are deemed applicable, they dictate choice of New Jersey's own six-year limitations period.

Whether in federal question cases, where the court is referred to state law, the state's choice of law rules must also be applied is a question to which the Supreme Court has alluded, but which it has never resolved. See, *e.g., UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696, 705 n.8, 86 S.Ct. 1107, 16 L.Ed. 2d 192 (1966); *De Sylva v. Ballentine,* 351 U.S. 570, 76 S.Ct. 974, 100 L.Ed. 1415 (1956); *McKenzie v. Irving Trust Co.,* 323 U.S. 365, 371 n.2, 65 S.Ct. 405, 89 L.Ed. 305 (1945); *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). Some courts faced with the issue have resolved it simply by citation to *Klaxon Co. v. Stentor Elec. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). See, *e.g., Robbins v. Bostian,* 138 F.2d 622 (8th Cir. 1943). But language in a number of Supreme Court cases suggests that *Klaxon* has no relevance. *Levinson v. Deupree,* 345 U.S. 648, 651, 73 S.Ct. 914, 97 L.Ed. 1319 (1953); *Holmberg v. Armbrecht,* 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946). See also *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 471-472, 62 S.Ct. 676, 86 L.Ed. 956 (1942) (Jackson, J. concurring).

Klaxon holds that a federal court in a diversity case is bound to follow the choice of law rules of the forum state. In diversity cases, the federal court sits as a state court, and the *Klaxon* rule insures fulfillment of the uniformity principle declared in *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The considerations underlying the *Klaxon* rule have little or no relevance in the federal question context. In such cases, state limitations are applied only to fill a void. In failing to enact its own limitations period,

> Congress could not have intended an unlimited period for enforcement as would otherwise exist in actions at law, and that, selection of a period of years not being the kind of thing judges do, federal judges should borrow the limitation[s] statute of the states where they sit. . . . In this area, as contrasted with diversity litigation, federal interests transcend those of the states; state limitation statutes and doctrines are utilized to effect federal, not state, policy [sic]
>
> . . . . .

Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83-84 (2nd Cir. 1961).

Application of state choice of law principles where the issue is the limitations period for commencement of a federal cause of action furthers no federal interests. On the contrary, modern choice of law principles, like New Jersey's interest analysis, have been developed to insure that in cases where there are multi-state factual contacts and where the legal issues will be resolved on the basis of state substantive law, the policies of all potentially interested states will be furthered or, at minimum, not frustrated. See, *e.g., Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28 (3rd Cir. 1975); *Mellk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967); *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 263 A.2d 129 (1970). In the instant case, however, the interests we seek to protect are federal ones which state choice of law principles are not designed to further.[12]

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[12] However, the Supreme Court has stated that, in choosing between two arguably applicable limitations statutes of the forum state

> there is no reason to reject the characterization that state law would impose unless the characterization is unreasonable or inconsistent with national labor policy.

UAW v. Hoosier Cardinal Corp., supra, 383 U.S., at 706, 86 S.Ct., at 1113 (1966).

(footnote continued on following page)

Accordingly, I hold that New Jersey's own six-year limitation applies and that the cause is not timebarred.

D. Accrual, Laches and Estoppel En Pais.

Defendant ILA also contends that plaintiff's cause of action accrued in 1969 when the Rules on Containers were first promulgated. Thus it argues that the action is timebarred even under New Jersey's six-year limitations statute. Both plaintiff and the ILA cite *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) as controlling. *Zenith*, an action involving Sherman and Clayton Act claims, sets forth the general rule on accrual of actions.

> The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is "commenced within four years after the cause of action accrued," 15 U.S.C. § 15(b), plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . In the context of a continuing conspiracy to violate the antitrust laws,

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(footnote continued from preceding page)

Where the forum state itself has several limitations of statutes, the court has no option but to choose among them. However, choosing among limitations periods of several states according to the forum's choice of law principles introduces a host of unnecessary complexities. State choice of law rules for selection of an appropriate statute of limitations are explored in *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 140-141, 305 A.2d 412 (1970), and *Allen v. Volkswagen of America, Inc.*, 555 F.2d 361 (3rd Cir. 1977). Attempting to apply these rules where the cause of action is federal is like fitting a round peg in a square hole. The most sensible thing to do, if the case law would permit it, would be for the federal courts to develop federal statutes of limitations, as a matter of federal common law, to fill the void.

> such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Id., at 338, 91 S.Ct., at 806.

The ILA attempts to avoid the import of this language by arguing that in this case, Conex has not pleaded any individual acts, but only the 1969 Rules on Containers. A reading of the complaint undermines this claim. Conex claims injuries resulting from *enforcement* of the Rules on Containers pursuant to the Dublin Supplement of 1973. It seeks to recover damages for particular acts—refusal to supply containers, pass-through of fines, and unnecessary dockside stuffing and stripping—which occurred within six years of the filing of the complaint. Conex does not, and may not, seek damages which flowed from acts which occurred prior to August 20, 1970. *Cf. United States v. Sealand Service,* 424 F.Supp. 1008 (D.N.J. 1977) (in suit for recovery of penalties for violation of Federal Maritime Commission tariffs by refusal to supply containers, "each decision to withhold requested containers" was an independent act).

ILA also argues estoppel *en pais,* laches, and equitable estoppel. These equitable theories are invoked based on ILA's claims that Conex intentionally avoided challenging the Rules on Containers when they were first implemented because, in fact, Conex thrived on their existence: watching the enforcement of the Rules drive its competitors out of business while developing techniques, including bribery of dock bosses and alteration of shipping documents, to evade the Rules' strictures.

Although the Court's research has unearthed no case law indicating that these equitable defenses may be raised as

a bar to a Section 303 damage claim,[13] the strictly compensatory nature of the 303 action suggests that if, in fact, the challenged acts and practices caused no injury to the business of the plaintiff, no recovery is permissible. In my view, a fuller development of the record, including exploration of the union's claims that Conex itself engaged in illegal conduct in order to circumvent the Rules, is required before the Court can rule on this aspect of the case. Summary judgment must therefore be denied on these equitable grounds as well as on the ground of illegality.

III. The Sherman Act Claims

Count I

Conex asserts also that the determinations of the NLRB "unequivocally establish the existence of a group boycott or concerted refusal to deal." The defendants argue against application of the doctrine of collateral estoppel because, *inter alia,* (1) it would deprive them of their right to a trial by jury; (2) it would frustrate the policy of the federal antitrust laws that exclusive jurisdiction of antitrust claims be vested in the federal courts; and (3) it is inappropriate because there is no identity of issues, no privity, and no opportunity for a full and fair hearing. Defendants argue further that the Rules on Containers are immune from antitrust attack by reason of the labor exemption to the antitrust laws. They argue also that, even if there be no complete immunity, the rule of reason must be applied to determine whether there has been a violation of the Sherman Act. Finally, the defendants raise a number of claims

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[13] In *Falsetti v. U.M.W.,* 355 F.2d 658 (3rd Cir. 1966), the court suggested, in *dicta,* that the equitable doctrine of laches could bar a § 301 claim. See also, *United States v. Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973) (equitable doctrine of laches is applicable to suit under Civil Rights Act of 1964).

which may be styled affirmative defenses: *i.e.,* the illegality of the plaintiffs' own operations, and the primary and exclusive jurisdiction of the Federal Maritime Commission.

A. Labor Law and Antitrust.

In my view, the issues of collateral estoppel, labor exemption and *per se* rule or rule of reason are inseparable. At the heart of each lies the so-called labor exemption to the antitrust law.

It is a commonplace that the antitrust laws and the labor laws are antithetical. The antitrust laws are designed to promote competition; the unions are in the business of limiting it. It has fallen largely to the courts to work out a proper conciliation of these competing desiderata.

While the conflict between labor and antitrust policies begins much earlier, the modern era is often said to begin with *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940). The Supreme Court there held that a union does not violate the Sherman Act by engaging in a violent primary sit-down strike. In Justice Stone's famous *dictum,* the Sherman Act was aimed only at "some form of restraint upon commercial competition in the marketing of goods or services;" *Id.* at 495, 60 S.Ct. at 993, it was not directed toward an elimination of price competition in the labor market.

One year after *Apex,* Justice Frankfurter wrote the Court's decision in *United States v. Hutcheson,* 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941). *Hutcheson* involved a jurisdictional dispute between two unions over a work assignment by Anheuser-Busch. The union that did not get the assignment organized a strike among the employees of certain contractors erecting a building for Anheuser, and a boycott of Anheuser beer by union members and friends. Under the precedent of the time, this was a Sherman Act violation. Justice Frankfurter, however, examined the anti-injunction provisions of the Clayton and Norris-LaGuardia

Acts and announced that activity immunized against injunction by those two statutes could not constitute a substantive offense under the Sherman Act.

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id., at 232, 61 C.Ct., at 466 (footnote omitted). Unlike Justice Stone, who declared in *Apex Hosiery* that the Sherman Act as such did not cover restraints in the labor market, Justice Frankfurter, in *Hutcheson,* created an *exemption* from the antitrust laws for unions "acting alone".

The corollary of this principle was that labor unions lose their immunity when they "aid nonlabor groups to create business monopolies and to control the marketing of goods and services." In *Allen Bradley Co.* v. *IBEW Local 3,* 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945), a union, in the interest of obtaining better wages, hours, and working conditions, induced electrical contractors to agree to use only equipment manufactured by firms having contracts with the union. The Supreme Court rejected the Second Circuit's view that, so long as the union was acting only in its own self-interest, and through means sanctioned by the Clayton Act, it was immune from antitrust sanctions. The Court instead appeared to adopt another *per se* rule: immunity is lost when a labor group is acting to "aid and abet businessmen" in conduct which, if engaged in by businessmen alone, would violate the Sherman Act. Immunity was not achieved merely because the union, acting for its own ends, was the moving force behind the arrangement; if manufacturers agreed, albeit unwillingly and under union pressure, to engage in joint action violative of the

Sherman Act arranged by the manufacturers alone, then the union, and presumably the manufacturers, were in violation.

Two important cases were decided in 1965: *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) and *Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965). In *Pennington,* by way of a counterclaim, a small coal producer sued the United Mine Workers alleging violation of the Sherman Act in the UMW's contract agreement with an association representing large mine operators. The challenged agreement embodied substantial wage concessions by the employers and acceptance by the union of increased mechanization. The union also agreed to impose identical wage terms on smaller non-union coal operators irrespective of those operators' ability to pay such wages. The Supreme Court split three ways on the issue of the UMW's exemption from antitrust liability. The opinion of the Court, delivered by Justice White, held that an agreement resulting from collective bargaining is not automatically exempt from Sherman Act scrutiny merely because the negotiations covered wage standards or other subjects of compulsory bargaining. Expressing displeasure with the agreement at issue, the Court noted that nothing in federal labor policy indicates that a union and employers in one bargaining unit are free to bargain about wages or working conditions in other bargaining units or to settle those questions for the entire industry. In the Court's view, such agreements were clearly contrary to the interests of the union and its duty to bargain unit by unit.

> The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers.

Id., at 666, 85 S.Ct., at 1591.

Justice Douglas' opinion, concurred in by Justices Black and Clark, agreed with the result, but emphasized that a wrongful intent is required for antitrust liability. The concurrence noted that the jury should be instructed that "if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that *if it was made for the purpose of forcing some employers out of business,* the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws." *Id.,* at 672-673, 85 S.Ct., at 1595 (emphasis added).

Justice Goldberg, joined by Justices Harlan and Stewart, dissented from the opinion but concurred in the result in a single opinion written for *Pennington* and *Jewel Tea.*

Jewel Tea involved a challenge to a butchers union multi-employer agreement which restricted the hours for sale of meat from 9:00 A.M. to 6:00 P.M. Jewel Tea, a grocery chain wishing to maintain night operations, entered into the agreement under threat of strike but thereafter sued the union and the employers who negotiated the agreement for violation of the Sherman Act. Again, the Court split three ways. Justice White, Chief Justice Warren and Justice Brennan framed the issue as "whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." *Id.,* at 689-690, 85 S.Ct., at 1602. The Court noted that "the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement," and that the collective bargaining agreement was a "combination" between union and employers. *Id.,*

at 691, 81 S.Ct., at 1603. Mechanical application of *Allen Bradley* would have rendered the conduct unlawful and the *Hutcheson* "acting alone" theory was inapplicable. Nevertheless, the Court found an exemption implied by the statutes setting forth the national labor policy. Hours of operation had been a historic concern of the butchers' union and there were indications that night operations would alter the character of the work itself. In that context, hours of operation were sufficiently related to wages, hours, and working conditions to fall within the proper scope of collective bargaining. The agreement was thus exempt from antitrust attack.

Justice Douglas, with whom Justices Black and Clark concurred, reasoned that, because the employers could not themselves agree on hours of operations, the union, by joining with them, exceeded the *Allen Bradley* rule and lost its exemption.

Justice Goldberg wrote an opinion, for both *Pennington* and *Jewel Tea,* in which he was joined by Justices Harlan and Stewart. He took the position that the agreements in both cases dealt with mandatory subjects of collective bargaining. As such, they were immune from antitrust attack. Justice Goldberg viewed the Court's decision as a denial of the right to consider legitimate subjects in the bargaining process and a frustration of the collective bargaining process itself. He deemed the Court's decision in both cases a throwback to past days when courts allowed antitrust actions against unions and employers engaged in conventional collective bargaining, because "a judge considered" the union or employer's conduct in question to be "socially or economically" objectionable.

The most recent Supreme Court pronouncement on the thorny issue of reconciliation of labor and antitrust law is *Connell Construction Co. v. Plumbers & Steamfitters, Local 100,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). Plumbers Local 100 represented workers in the

plumbing and mechanical trades in Dallas. It had successfully used picketing to force a number of general contractors to agree to subcontract work in the trade only to subcontractors which had collective bargaining agreements with the union. Connell, a general contractor, filed suit in Texas State Court to have the picketing enjoined under state antitrust law. After Local 100 removed to federal court, Connell signed the subcontracting agreement under protest, then sued for violations of Section 1 of the Sherman Act.

Justice Powell wrote for the majority and held that the Clayton statutory exemption was not available because the arrangement involved both labor and nonlabor groups. He further held that the *Jewel Tea* "non statutory" [sic] exemption which may arise by implication and which has its source in the strong labor policy favoring the association of employers to eliminate competition over wages and working conditions was unavailable because the union did not represent or seek to represent Connell's employees. The nonstatutory exemption offers no protection when a union and a non-labor party agree to restrain directly competition in a business market, even if the union's organization objective is lawful. The Court, finding the activity non-exempt, remanded for consideration of whether the agreement violated the antitrust act. In doing so, however, and in explaining Connell's secondary holding that the state antitrust laws were preempted by federal antitrust laws, the majority, citing *Apex Hosiery,* noted that

> Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves.

Id., at 636, 95 S.Ct., at 1842.

The dissenting views of Justices Stewart, Douglas, Brennan, and Marshall were expressed in an opinion by Justice Stewart. The dissenters believed that the picketing at Connell's site was secondary activity because it was designed to induce Connell to agree to subcontract only to firms which had signed collective bargaining agreements with Local 100; the union had no desire to organize or represent Connell's employees. Thus it was proscribed secondary activity, "subject to detailed and comprehensive regulation pursuant to § 8(b)(4) of the National Labor Relations Act . . . and § 303 of the Labor Management Relations Act. . . . Similarly, the subcontracting agreement under which Connell agreed to cease doing business with nonunion mechanical contractors was governed by the provisions of § 8(e) of the National Labor Relations Act." In the view of the dissenters, legislative history unmistakably demonstrated that in regulating secondary activity, "Congress [had] selected with great care the sanctions to be imposed if proscribed union activity should occur." In so doing, Congress rejected efforts to give private parties injured by union activity such as that engaged in by Local 100 the right to seek relief under federal antitrust laws." *Id.*, at 639, 95 S.Ct., at 1843. Justice Douglas joined in the dissent, but also wrote separately to indicate that the result might be different if Connell alleged or attempted to show a conspiracy between Local 100 and the subcontractors, rather than coercion of the employer by the union. *Id.*, at 638, 95 S.Ct., at 1830.

One final Supreme Court decision must be examined before attempting to place the instant case in the precedential framework. That case is *National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967), a product boycott-work-preservation case, involving a strike by carpenters who, acting pursuant to their collective bargaining agreement, refused

to hang prefitted doors. The National Woodwork Manufacturers Association filed charges with the NLRB against the union alleging that by including the "will not handle" prefitted doors clause in the collective bargaining agreement, the union had committed the unfair labor practice under § 8(e) of entering into an agreement whereby the employer agrees to cease or refrain from handling any of the products of any other employer, and alleging further that in enforcing the sentence, the union committed the unfair labor practice under § 8(b)(4)(B) of forcing or requiring any person to cease using the products of any other manufacturer. The NLRB dismissed the charges adopting the findings of the Trial Examiner to the effect that the contract provision and its enforcement by the union were primary activity outside the proscriptions of §§ 8(e) and 8(b)(4)(B). See also, *NLRB v. Enterprise Association,* 429 U.S. 507, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977).

The Court of Appeals for the Seventh Circuit reversed. It held that the will not handle agreement violated § 8(e) without regard to any "primary" or "secondary" objective. In the Court's view, the contract clause was designed to effect a product boycott like the one condemned in *Allen Bradley,* and Congress meant, in enacting §§ 8(e) and 8(b)(4)(B) to prohibit such agreements and conduct forcing employers to enter into them. Nevertheless, the court sustained the dismissal of the § 8(b)(4)(B) charge, agreeing that the union's conduct as to the struck contractor involved only a primary dispute protected by the proviso that "nothing contained in this Clause (B) shall be construed to make unlawful [where not otherwise unlawful,] any primary strike or primary picketing . . ."

The Supreme Court held that § 8(b)(4)(A), the predecessor of § 8(b)(4)(B), was directed only at secondary activity, that is, it was meant to protect the employer only from union pressures designed to involve him in disputes not his own. *National Woodwork Manufacturers Ass'n.*

v. NLRB, 386 U.S. at 625-626, 87 S.Ct. 1250. The Court rejected the Association's argument that *Allen Bradley* compelled a finding that the enforcement of the "will not handle" clause violated §8(b)(4)(B). The Court explained *Allen Bradley* as follows:

> . . . [T]he boycott of out-of-state electrical equipment by the electrical contractors' employees was not in pursuance of any objective relating to pressuring their employers in the matter of *their* wages, hours, and working conditions; there was no work preservation or other primary objective related to the union employees' relations with their contractor employers. On the contrary, the object of the boycott was to secure benefits for the New York City electrical manufacturers and their employees. "This is a secondary objective because the cessation of business was being used tactically, *with its eye to its effect on conditions elsewhere.*" . . . [T]he fact is that the boycott in *Allen Bradley* was carried on, not as a shield to preserve the jobs of Local 3 members, traditionally a primary labor activity, but as a sword, *to reach out* and monopolize all the manufacturing job tasks for Local 3 members. It is arguable that Congress may have viewed the use of the boycott as a sword as different from labor's traditional concerns with wages, hours, and working conditions. *But the boycott in the present case*[*s*] *was not used as a sword; it was a shield carried solely to preserve the members' jobs.* We therefore have no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product.[14]

[14] This is of course the question addressed by the NLRB and determined adversely to the union in this case. The language of

(footnote continued on following page)

Id., at 629-631, 87 S.Ct., at 1260 (footnotes omitted) (emphasis added). In a footnote which succinctly states the problem which now confronts this Court, the majority stated:

> We likewise do not have before us in these cases, and express no view upon, the antitrust limitations, if any, upon union-employer work-preservation *or* work-extension agreements. See *United Mine Workers of America v. Pennington* . . . .

Id., at 631, n.19, 87 S.Ct., at 1261 (emphasis added). Mr. Justice Harlan concurred but took pains to point out that:

> In view of Congress' deep commitment to the resolution of matters of vital importance to management and labor through the collective bargaining process, and its recognition of the boycott as a legitimate weapon in that process, it would be unfortunate were this Court to attribute to Congress, on the basis of such an opaque legislative record, a purpose to outlaw the kind of collective bargaining and conduct involved in these cases.

Id., at 649-650, 87 S.Ct., at 1271. Justice Stewart, joined by Justices Black, Douglas and Clark, dissented.

The NLRB decision in this case, affirmed by the Second Circuit, establishes that the Rules on Containers and the enforcement of those rules constituted secondary work acquisition outside the protected scope of *National Woodwork Co.* and proscribed by §8(b)(4) and §8(e). Conex maintains that the Board's findings also establish the oc-

(footnote continued from preceding page)

National Woodwork, however, suggests to me that the NLRB and Second Circuit were wrong: the jobs of the ILA members *were* threatened by the boycotted product and the union activities were not used as an *Allen Bradley* sword to influence labor relations of a different employer.

currence of a group boycott or concerted refusal to deal, *per se* violations of the antitrust laws. Although the Court has decided that the NLRB adjudication is determinative of the labor law issues, *supra,* at 9, that determination is not dispositive of the antitrust claims. In short, the Supreme Court precedent indicates that conduct described as secondary, and thus proscribed by the labor laws, does not *ipso facto* constitute conduct violative of the antitrust laws. In fact, the labor context in which the antitrust claims arise itself militates against the facile conclusion that there is a remedy under the antitrust laws.

It is clear that this case does not fall within the statutory antitrust exemption of *Hutcheson;* the ILA was not acting alone.

It is somewhat less clear that the instant case should not be governed by *Allen Bradley. Allen Bradley* may be read for the proposition that a boycott which directly restricts competition, and which is brought about by a combination of unions and employers, is a *per se* violation of the Sherman Act. But the development of the law did not stop with *Allen Bradley,*[15] and much has occurred since that 1945 decision was written.

Pennington and *Jewel Tea* establish that contracts addressing mandatory subjects of collective bargaining and negotiated in the union's self-interest are immune from antitrust attack, at least where the intent of the parties is

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[15] Even *Allen Bradley* may be read more narrowly as simply holding that the non-statutory exemption is unavailable, but that the activity may still be beyond the scope of the antitrust laws. And certain language in *Allen Bradley* suggests that a union commits an antitrust violation only when it participates in a pre-existing employer conspiracy.

Interestingly, the *Allen Bradley* court treated the situation as if the union had merely joined an already existing conspiracy of employers, while the facts of the case strongly suggest that the union had masterminded the plan.

not blatantly anticompetitive. I believe that this is such a contract.

Whether the ILA's interest in containerization is characterized as work preservation, work acquisition, or work reacquisition, it is beyond dispute that this technological change in the industry and its direct effect on the job security of the longshoremen has been at the very center of labor relations on the waterfront for many years. It posed a serious threat of lost jobs, lost work opportunities, reduced earnings, and reductions in gang size and daily work time to the ILA. A duty to bargain collectively on the subject is imposed by 29 U.S.C. § 158, and the union here was acting to preserve the jobs of its members.

The negotiations which resulted in the Rules on Containers were not only encouraged—but participated in—by a Presidentially-appointed mediator. As early as 1964, a report by the Secretary of Labor stressed the importance of collective bargaining as the means to resolve the "innovation-work preservation" problems which were of critical concern to the longshoremen, to the industry, and to the nation. The 1968 report to the President of the United States by the Board of Inquiry created by Executive Order 11431 stressed the importance of negotiation.

> The economic interests of the industry and the employees are in conflict, and the parties in the course of two months of negotiations have not been able to reconcile their respective interests. Unless the positions of one or both parties is substantially changed, this dispute may persist indefinitely.

The Rules at issue were themselves worked out with the aid of an advisor appointed by the President after a long strike following an 80-day Taft-Hartley cooling-off period. Affidavit of Thomas W. Gleason, May 1, 1977, ¶ 34. Affidavit of James J. Dickman, April 12, 1977, Ex. 4.

Moreover, the Rules were put into effect during a period when all official indications suggested that they were legitimate. In *International Container Transport Corp. v. NYSA* [*ICTC*], 426 F.2d 884 (2nd Cir. 1970), the Court of Appeals for the Second Circuit reversed a grant of preliminary injunctive relief on an antitrust claim, holding that there was little possibility of success on the merits in light of the fact that the ILA was acting in its own self-interest, and citing *Hutcheson* and *Allen Bradley*. In 1969, the Regional Director of the NLRB refused to issue a Board complaint on the ground that the Rules were valid work preservation under *National Woodwork*.

In this context, a finding of *per se* antitrust liability seems fundamentally inequitable and fundamentally at odds with the Supreme Court's decision indicating that the policies of the antitrust acts must be balanced against those reflected in the labor laws.

The decisions of the lower courts which have addressed analogous issues are instructive: none has found a *per se* antitrust violation simply because the challenged actions were found to be outside of either the statutory or implied labor exemptions to the antitrust laws. See *Republic Productions, Inc. v. American Federation of Musicians,* 245 F.Supp. 475 (S.D.N.Y. 1965); *National Dairy Prod. Corp. v. Milk Drivers & Dairy Employees,* 308 F.Supp. 982 (S.D.N.Y. 1970). The decision of the Second Circuit in *Commerce Tankers Corp. v. National Maritime Unions,* 553 F.2d 793 (2nd Cir. 1977), deserves close attention.

Commerce Tankers, for economic reasons, attempted to sell its last remaining vessel to Vantage Steamship Corp. The National Maritime Union, which represented the seamen on the vessel, objected to the sale because Commerce had not obtained a commitment from Vantage to continue the NMU as bargaining representative in accordance with a provision of NMU's collective bargaining agreement

with Commerce. NMU first obtained an injunction against the sale in federal district court. That injunction was reversed after the Regional Director of the NLRB, in a § 10(l) NLRA application, alleged that there was reasonable cause to believe the clause violated § 8(e) of the NLRA. That determination was later confirmed by the NLRB and upheld by the Second Circuit on appeal. Commerce and Vantage then sued NMU alleging its conduct violated both the NLRA and the Sherman Act. The district judge found that the proximate cause of any damage was the original injunction against the sale and limited recovery to the injunction bond posted by NMU.

The Court of Appeals reversed and remanded for consideration of the Sherman Act claims.

> [Commerce and Vantage] ask us . . . to hold that the restraint-on-transfer clause would not be exempt from the antitrust laws under the standards established by *Connell* . . . and that the agreement constitutes a group boycott and is illegal per se under section 1 of the Sherman Act (citation omitted). Both these assertions raise extremely complex and significant questions on the interaction between the federal labor and antitrust laws. The accommodation of the conflicting policies reflected in these laws has aptly been called "a troublesome and unruly issue." See Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U.Chi.L.Rev. 659 (1965). *Connell* indicates that a "nonstatutory" exemption from the antitrust laws in this case . . . turns upon whether the restraint-on-transfer clause was a "direct restraint on the business market . . . that would not follow naturally upon the elimination of competition over wages and working conditions," . . . and whether the inclusion of the clause in "a lawful collective-bargaining agreement" shelters the NMU because of the "federal policy favor-

> ing collective bargaining . . ." *And we do not believe that our prior holding that the clause violated § 8(e) necessarily determines that antitrust issue, although it lends support to appellants' position. And even if the "nonstatutory" exemption does not apply, there is at least a substantial question whether a per se approach under the antitrust law is applicable in the case of a non-exempt labor activity.*

Id., at 801-802 (footnotes omitted), (emphasis supplied). The Court then quotes Professor Milton Handler:

> This brings us to the question of antitrust liability where union activity is held to be non-exempt. The principal danger of these recent rulings is that a finding of antitrust liability will automatically be made whenever the challenged conduct is held to be non-exempt. This would be a *per se* approach with a vengeance. Arrangements may fall outside the scope of mandatory bargaining and yet have no adverse effect on competition. We still must find whether the agreement restrains trade and whether the restraint is unreasonable. A fair reading of *Jewel Tea* . . . satisfies me that the Court intended that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust. Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 233, 239-240 (1971).

Id., at 802, n.8. See also T. St. Antoine, Secondary Boycott: From Antitrust to Labor Relations, 40 Antitrust L.J. 242, 256 (1971). ("Yet even if forbidden under the NLRA, a work acquisition clause has strong labor market overtones, and is thus arguably free of antitrust implications under the *Apex* test.)

Implicit rejection of the *per se* approach also helps to explain the confusion otherwise engendered by the co-

existence of the opinion in *CTC v. NYSA*, and the Second Circuit's affirmance of the Board's order in *ILA v. NLRB*. Affirming the NLRB decision which our plaintiff argues should be given collateral estoppel effect in this case, the Second Circuit referred to *ICTC* this way:

> Admittedly, the rationale given by the court was that in such agreement ILA was acting in its self-interest with the object of preserving for its members work traditionally performed by them as longshoremen. However, Judge Hayes' opinion . . . carefully distinguishes an action (such as the instant one) which is within the exclusive jurisdiction of the NLRB and which is "based on different allegations and seeking an entirely different remedy [where], the court must defer to the Board."

ILA v. NLRB, 537 F.2d 706, 708 n.1 (2nd Cir. 1976). See also *International Association of Heat & Frost Insulators v. United Contractors Ass'n.*, 494 F.2d 1353 (3rd Cir. 1974), *amending* 483 F.2d 384 (3rd Cir. 1973). Thus summary judgment is denied on the Sherman Act claims. Even if the NLRB determination of unlawful work acquisition is given collateral estoppel effect in the § 303 context, that determination does not foreclose the antitrust inquiry. A *per se* approach is inappropriate in these circumstances given the sensitive balancing that must be done to reconcile competing labor and antitrust interests, given the failure of the Supreme Court to articulate a coherent theory adopted by a majority of Justices, given the general trend away from the application of the *per se* rules, and given the fact that, although the agreement has been adjudicated impermissible under the labor laws it was clearly grounded, at least in part, in the unions [sic] perceived goal of protecting the interests of its members vis-a-vis their own

employers, and was given at least initial validation by the executive and judicial branches.

Under these circumstances, trial of the issues of anti-competitive intent and anticompetitive effect is warranted. Summary judgment will, accordingly, be denied.

B. The Illegality Defense.

Although this is sufficient to resolve the motions now pending, interests of judicial economy suggest that the Court now address the asserted defense to the antitrust claim of illegality and primary and exclusive jurisdiction of the National Maritime Commission.

All of the defendants argue that plaintiff's own wrongdoing bars recovery on its antitrust claims. The defense, like the ILA's asserted defense to the Section 303 claim, is based on allegations that, during the relevant time period, plaintiff operated as a freight forwarder without holding the license required under Part IV of the Interstate Commerce Act, 49 U.S.C. §§ 1001 *et seq.* To reiterate, plaintiff, for purposes of this motion, does not deny that it was operating without a license. It argues instead that the asserted defense of "illegality" is insufficient as a matter of law.

The Supreme Court has noted the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes. Thus, in *Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), the court held that plaintiff's participation in an unrelated antitrust conspiracy was no bar to its suit for treble damages.

> If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured.

Id., at 214, 71 S.Ct., at 261. In *Perma Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed. 2d 982 (1968), the court held that the doctrine of *in pari delicto* would not bar plaintiff's recovery on an antitrust claim. *Perma Life* was a suit brought by a number of Midas dealers against Midas and its parent corporation. Plaintiffs charged that their dealership agreements with Midas contained provisions for tie-ins, resale price maintenance, exclusive dealing, and territorial restrictions which allegedly contravened federal antitrust law. The district court and the court of appeals ruled in favor of the defendants. The plaintiffs had enthusiastically accepted the agreements and had reaped their benefits; they would not be heard to complain that the agreements were illegal.

The Supreme Court reversed. Justice Black's lead opinion noted that plaintiffs' conduct may have been "morally reprehensible," but that the law nevertheless encourages their suit to further the overriding public policy in favor of competition.

> A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.

Id., at 139, 88 S.Ct., at 1984. Justice White concurred in the judgment, but stated that resolution of these kinds of cases should focus on the purpose of the Clayton treble-damage provision: recovery to private plaintiffs *injured* by conduct violative of the antitrust laws. Justice Fortas also

concurred in the result, but thought that the doctrine of *in pari delicto* could apply where the fault of the parties was indeed of equal magnitude; he did not think that this was such a case. Justice Marshall concurred in the judgment but felt that the principle that a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental to our jurisprudence. In his view, the public interest does not require that a plaintiff who has actively sought to bring about illegal restraints for his own benefit be permitted to demand redress in the form of treble damages from a partner no more responsible for the existence of the illegality than the plaintiff. This, in his view, was not such a case. Justice Harlan, with whom Justice Stewart joined, thought that *in pari delicto* was a proper defense to an antitrust claim, but that the lower courts had improperly applied the doctrine.

In the instant case, plaintiff's alleged wrongdoing is neither participation in the antitrust violation which is the subject of the suit nor participation in an unrelated anticompetitive scheme. Defendants here charge that plaintiff was operating in violation of a completely independent federal regulatory scheme.

Some courts have viewed such an asserted defense as no more than a species of *in pari delicto* and they have rejected it on the authority of *Kiefer-Stewart* and *Perma Life*. In a leading case, *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972), plaintiff, a licensed used car dealer, sued defendant new car dealers charging that they had conspired to prevent plaintiff from furnishing new cars to its customers. Defendants asserted that plaintiff was not licensed under state law to sell new cars. The court examined the public interest which the state licensing scheme sought to protect, but concluded that "the policy values inherent in the antitrust statutes . . . clearly outweigh any social value flowing from a state licensing statute." *Id.*, at 1370.

In *Health Corporation of America, Inc. v. New Jersey Dental Ass'n*, 424 F.Supp. 931 (D.N.J. 1977) (Brotman, J.), plaintiffs were designers and administrators of dental health programs for groups such as unions. By judicial decision and administrative action, they had been found to be operating in violation of the New Jersey Dental Service Corporation Act and the New Jersey Dental Practice Act. They sued defendant dental associations charging, *inter alia*, that the defendants had conspired to monopolize the delivery of dental health care by instituting sham lawsuits and administrative proceedings, and through threats, harassment, coercion and dissemination of misinformation to induce dentists not to contract with plaintiffs. Defendants raised the plaintiffs' unlawful operation as a bar to the antitrust suit. The court rejected the asserted defense. The court discussed *Kiefer-Stewart* and *Perma Life*, and it pointed out that the administration of dental health care programs is neither criminal nor contrary to public policy. It noted that plaintiffs could bring their activities within the law with some operational changes and were attempting to do so. The court concluded:

> Plaintiffs claims will not be dismissed because they were in violation of state statutes. The state has enforced its statutes. This court will not impose an additional penalty.

Id., at 934. See also *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 1975-1 Trade Cas. ¶ 60,187 (D.Colo. 1975), *aff'd* 1977-2 Trade Cas. ¶ 61,565 (10th Cir. 1977) (alleged violations of state and federal licensing laws); *Schnapps Shop, Inc. v. H.W. Wright & Co., Ltd.*, 377 F.Supp. 570 (D.Md. 1973) (violation of state unfair sales act); *Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425 (10th Cir. 1977), *rev'ng* 410 F.Supp. 536 (D.Wyo. 1976) (violation of state liquor licensing laws); *cf. Memorex Corp. v. International*

Business Machines Corp., 555 F.2d 1379 (9th Cir. 1977) (unlawful market presence no bar).

Some courts, on similar facts, have reached a contrary conclusion. *American Bankers Club, Inc. v. American Express Co.*, 1977-1 Trade Cas. ¶ 61,247 (D.D.C. 1977) was a suit by a plaintiff who charged that defendants had conspired to frustrate his attempts to enter the travelers check market. The court dismissed its claims, holding that the interest bearing travelers checks which plaintiff sought to market would violate federal banking laws. Accordingly, plaintiff was deemed not to have any business or property interest in marketing such checks and thus no right to recovery under the antitrust laws.

In an early case, *Maltz v. Sax*, 134 F.2d 2 (7th Cir.), *cert. denied*, 319 U.S. 772, 63 S.Ct. 1437, 87 L.Ed. 1720 (1943), the manufacturer of gambling devices instituted an antitrust suit. Although no federal statute prohibited manufacture or sale of such devices, use of gambling apparatus had been condemned as violative of the Federal Trade Act and gambling had been held, in other contexts, to be against public policy. The court foreclosed recovery on alternative grounds of unclean hands and "no legal right." See also *Heath v. Aspen Skiing Corp.*, 325 F.Supp. 223 (D.Colo. 1971) (ski instructor who had no use permit from the U.S. Forest Service could not prevail in antitrust action against Forest Service permittees who had refused to allow him to conduct a ski school at the ski areas they operated); *Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co.*, 440 F.2d 36 (10th Cir.), *cert. denied*, 404 U.S. 857, 92 S.Ct. 107, 30 L.Ed.2d 99 (1971) (plaintiff who lacked certificate of public necessity from Utah Public Service Commission could not maintain antitrust action charging attempt to monopolize market for electrical power "if [Cottonwood] had no right to sell electricity, then by definition Power Company could not interfere with this

right."); *Turner v. American Bar Association*, 407 F.Supp. 451 (N.D.Ind. 1975), *aff'd sub nom. Taylor v. Montgomery*, 539 F.2d 715 (7th Cir. 1976) (unlicensed lawyers).

If "illegality" were a mere common law defense, a species of *in pari delicto*, *Perma Life* and *Kiefer-Stewart* would preclude the defense. But Section 4 of the Clayton Act itself provides a private treble damage remedy only where a party is "injured in his business or property." "Injury" within this section implies violation of a legal right. *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163, 43 S.Ct. 47, 67 L.Ed. 183 (1922). And the courts in adjudicating antitrust claims have consistently inquired whether plaintiff's "business or property" is worthy of legal protection. See *Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.), *cert. denied*, 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451 (1966).

The plaintiff here is not accused of violating a state or even a federal statute in the manner in which it conducted business; it admittedly is precluded by federal law from conducting any such business.

Title 49 U.S.C. § 1010(a)(1) provides, with certain exceptions not relevant here:

> No person shall engage in [freight forwarding] service[s] unless such person holds a permit . . .

Under 49 U.S.C. § 1010(c)

> The Commission shall issue a permit to any qualified applicant therefor, . . . if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act.

The Commission is empowered to enforce these provisions through suit for injunction, 49 U.S.C. § 1017(b). Willful violation is a misdemeanor punishable by fine.

Appendix C—Opinion of District Court.

The Court's task here is not to weigh the importance of the national transportation policy against the policies embodied in the federal antitrust laws. Nor is it to evaluate the comparative moral worth of those who violate one statute or the other. But the Court must read the statute under which plaintiff is suing, and if plaintiff's activities were precluded by federal law, then it has suffered no injury to its business or property which is compensable under the Clayton Act. This is not to suggest that any breach of any magnitude of any state or federal regulatory scheme will render an antitrust plaintiff an outlaw not entitled to invoke the protection of the antitrust laws. But where plaintiff's entire business operation is conducted in blatant, willful violation of federal law, plaintiff will not be heard to complain that the profits of that illegal enterprise have been diminished because of defendant's wrongful refusal to deal. Those who practice law or medicine without a license cannot invoke statutes which prohibit anticompetitive business practices to protect their illegal practice; nor could an unlicensed gun dealer invoke these statutes against the manufacturer. The defense is not insufficient as a matter of law, and summary judgment for plaintiff must therefore be denied.

CONCLUSION

Plaintiff's motion for summary judgment on Counts I and III of the complaint will be denied.[16]

[16] The Court has considered the other contentions raised by the parties, and has concluded that they compel no different result.

APPENDIX D

Order of District Court.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 76-1645

CONSOLIDATED EXPRESS, INC.,

Plaintiff,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; and UNIVERSAL MARITIME SERVICES CORP.,

Defendants.

Civil Action No. 77-156

TWIN EXPRESS, INC.,

Plaintiff,

v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN W. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; and UNIVERSAL MARITIME SERVICES CORP.,

Defendants.

For the reasons set forth in this Court's opinion filed this date,

It is, on this 19 day of December, 1977,

Appendix D—Order of District Court.

ORDERED that plaintiffs' motion for partial summary judgment be, and it hereby is, denied.

H. STERN
HERBERT J. STERN
United States District Judge

APPENDIX E

Supplemental Opinion of District Court.

Defendant ILA seeks reargument of the Statute of Limitations question contending that this Court overlooked controlling Supreme Court precedent—that is, Cope v. Anderson, 331 U.S. 461 (1947)—and erred in holding that New Jersey's 6-year Statute of Limitations applied rather than in holding that New Jersey would, quote, "borrow," end quote Puerto Rico's shorter Statute of Limitations.

Defendant assumes that New Jersey has a borrowing statute. Frankly, I can find none. In fact, the New Jersey Supreme Court has said that a litigant who sues in New Jersey Courts on a foreign statutory right not conditioned by limitation in its terms is subject to the applicable New Jersey Statute of Limitations. Pennhurst State School v. Goodhartz Estate, 42 N.J. 266, 200 Atlantic 2d 112 (1964).

While this holding probably does not survive more recent New Jersey decisions which hold that the choice of a limitations period will be made through choice of law interest analysis—Heavner v. Uniroyal, Inc., 63 N.J. 130 (1970)—interest analysis simply has no relevance where the cause of action sued on is a Federal one and State Law is applied simply because there is no Federal Law on the subject.

Assuming that interest analysis applies where the cause of action is created and governed by federal substantive law, this Court still is of the view that New Jersey would apply its own limitations period. In Heavner, the Supreme Court of New Jersey stated:

"We are convinced the time has come . . . to discard the mechanical rule that the limitations law of this state must be employed in every suit on a foreign cause of action. We need go no further now than to say that when the cause of action arises in another state the parties are all present in and amenable to the jurisdiction of that

state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. In essence, we will 'borrow' the limitations law of the foreign state. We presently restrict our conclusion to the factual pattern identical with or akin to that in the case before us, for th re may well be situations involving significant interests of this state where it would be inequitable or unjust to apply the concept we here espouse." End of quotation from the Heavner opinion.

The Court would, thus be compelled to balance the five factors enumerated by the Heavner Court; where the cause of action arose, amenability to suit in other states, the substantial interest, if any, of New Jersey in the suit, which of the state's substantive law will apply, and, finally, whether the other state's Statute of Limitations has run—to determine here the relevant factual contacts. See Allen v. Volkswagen of America, Inc. —— F.2d —— (Third Circuit, May 10, 1977).

The Court notes that the borrowing rule announced in Heavner explicitly seeks to discourage forum shopping by litigants with slender ties to New Jersey who desire the benefit of New Jersey's more favorable limitations period. Thus, New Jersey choice of law rules require a determination of which law will govern the merits of the case.

This is the factor that falls out of the equation completely when the cause of action is one that is created only as a matter of federal law.

Applying the formula to the four remaining factors the analysis would go something like this. None of the acts about which Conex complains occurred in Puerto Rico. Rather, the stripping and restuffing of containers, the denial of containers, and the refusal to accept containers for shipment all occurred in the Port of New York area;

specifically at the New Jersey pierside facilities of Sealand and Sea Train. New Jersey must, thus, be considered the state where the cause of action accrued. The ILA may not be amenable to suit in Puerto Rico. New Jersey does have a substantial interest in the lawsuit in terms of deterring further misconduct within its borders and enforcing the legal duties owed by those acting within the state, albeit that those legal duties have been created by federal law, and the Puerto Rican limitations period has run. This is the happy equation that we are left with under the Heavner test.

Consideration of these four factors suggests no reason why New Jersey would choose not to apply its own limitations period in this case in favor of the limitations period in Puerto Rico. As earlier noted, the New Jersey borrowing rule exists to discourage forum shopping by litigants with slender ties to New Jersey who yet desire the benefit of New Jersey's relatively long limitations period. This policy would not be undermined in the slightest by failure to apply a foreign limitations period in this case. All of the allegedly wrongful conduct occurred in the Port of New York-New Jersey area. Puerto Rican substantive law will not apply. And it is clear that the District of New Jersey was chosen as the place to bring suit because all defendants are amenable to suit here and prior proceedings before Judge Lacey, a member of this Court, took place here.

Thus, assuming that the defendant ILA is correct in its assertion that New Jersey's borrowing rules, that is, common law and not statutory, are applicable here, a conclusion which I do not agree with, even if I were to apply that analysis I would nevertheless conclude that under the circumstances New Jersey Courts would not borrow the Puerto Rican limitations period.

APPENDIX F

District Court's Order Amending Opinion.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 76-1645

CONSOLIDATED EXPRESS, INC.,

Plaintiff,

v.

NEW YORK SHIPPING ASSOCIATION, INC., et al.,

Defendants.

Civil Action No. 77-156

TWIN EXPRESS, INC.,

Plaintiff,

v.

NEW YORK SHIPPING ASSOCIATION, INC., et al.,

Defendants.

It is on this 22nd day of February, 1978,

ORDERED that this Court's Order filed on December 20, 1977 be, and it hereby is, amended to include the following language:

> Further, it is certified, pursuant to 28 U.S.C. § 1292 (b), and F.R.App.P. 5(a), that this order involves controlling questions of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The controlling questions are:

1. Where plaintiff's business is conducted unlawfully, that is, where it operates as a freight forwarder having been refused a license by the Interstate Commerce Commission to so operate, has it suffered injury "in its business" which is compensable in an action under Section 303 of the Labor Management Relations Act?

2. Does the NLRB's finding of an unfair labor practice foreclose consideration of the labor exemptions, statutory or implied, to the antitrust laws?

3. Must the legality of the Rules on Containers be tested against a *per se* rule of anti-trust violation?

4. Where plaintiff's business is conducted unlawfully, that is, where it operates as a freight forwarder having been refused a license by the Interstate Commerce Commission to so operate, has it suffered injury to its business which is compensable under the Clayton Act?

H. STERN
HERBERT J. STERN
United States District Judge

APPENDIX G

Relevant Statutes

Section 8(b)(4) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 158(b)(4):

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Section 8(e) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 158(e):

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Section 303 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 187:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for

any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Section 1 of the Sherman Act, 1890, as amended, 15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 3 of the Sherman Act, 1890, as amended, 15 U.S.C. § 3:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Ter-

ritory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 1914, as amended, 15 U.S.C. § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16 of the Clayton Act, 1914, as amended, 15 U.S.C. § 26:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of

irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

APPENDIX H

Transcript of Motion for 28 U.S.C. § 1292(b) Certification.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Newark, New Jersey
February 22, 1978

Civil No.: 76-1645 and 77-156

CONSOLIDATED EXPRESS, INC.,

Plaintiff,

vs.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.,

Defendants.

Before: THE HONORABLE HERBERT J. STERN, U.S.D.J.

• • • • • •

[3] The Court: We are meeting here to discuss my other errors. First of all, I should note that the plaintiff's papers were correct. I have a typographical error. I'm going to change the date of August 20, 1976, to August 20, 1977. I'll sign such an order today. So we needn't concern ourselves with that aspect.

By the way, if anybody—this is a very copious opinion. If you see any other typographical errors, please tell me

about it. You'll be doing not only the Court a favor but yourself a favor. You would not have to litigate nonsense. God knows, there are enough issues to litigate.

There are two issues. One is for reconsideration. The second is for certification.

I'm not inclined to reconsider. I have done the best I can. I am willing to admit that I may be wrong. I probably shouldn't say such things on the record. But I would be amazed if as this case winds its way up the ladder of judicial review there aren't many different opinions expressed by many different judges here. It's the nature of this beast. I would be amazed, if this goes on to review by the Court of Appeals and ultimately by the Supreme Court of the United States. I would be amazed if 12 judges or 21 judges consider this thing, that there will be unanimity of opinion among any panel that considers it. It's a most difficult question. Rather, a series of questions. I don't think I'm [4] conceding anything very grave by saying that. I mean only an idiot would think this was a simple case to decide.

There are no really good solutions here. You know, there is no clear path to heaven. I don't think anybody can see exactly which or what advances what interests perfectly. It's all a balancing and an accommodation.

In any event, right or wrong, I'm persuaded that I've done the best I can. You are not going to do any better at this level.

I am also reasonably persuaded, after reviewing the arguments pro and con for certification, that due to the difficulty of the problems here that an Appellate Court might well disagree with me in several critical areas. And I am very much inclined to certify at least some of the questions for immediate review.

I feel that if I have incorrectly decided some of these matters that I may cost the litigants a great deal of money

in terms of discovery which would have to be taken, and a greatly enhanced trial.

Now, I'm not perfectly convinced it ought to be certified. But then again, the Court of Appeals doesn't have to take it.

• • • •

[6] The Court: Clearly in the class action area they just don't want it. What concerns me is the legal issues as stated in this case are really monumental. They effect—they stay at the crossroads between the labor laws and the antitrust laws.

• • • •

[26] The Court: Another fact that concerns me. I see the issues here of national scope and importance.

Mr. Benkard: I think they are.

The Court: I see that the law that will emerge from this case can have tremendous precedential effect upon the relationships between unions, employers, and third-party businessmen throughout the country. Right now you got a District Court opinion which presumes to say a lot of things [27] about some very difficult issues. Aside from the question of the parties here, does it make sense to get some of these legal issues up for review? I would assume no matter whether a lawyer agrees or disagrees with this opinion, they are going to be negotiating some future contracts around this country with an eye towards what we have said here. Some concern to me.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1902

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,
v.
CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,
Respondents.

No. 78-1905

NEW YORK SHIPPING ASSOCIATION, INC., *et al.*,
Petitioners,
v.
CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, Consolidated Express, Inc. ("Conex") and Twin Express, Inc. ("Twin"), respectfully request that the Court deny the petitions for writs of certiorari seeking review of the Third Circuit's decision in these cases. The opinion below, which is not yet officially reported, is reproduced as Appendix A in the separately

bound joint appendix to the petitions in Nos. 78-1902 and 78-1905, at 1a-71a.[1]

STATEMENT OF THE CASE

A. NATURE OF THE CASES

In 1973 and 1974, Conex and Twin were subjected by petitioners to a blatant boycott which brought their businesses to the brink of destruction. Respondents brought these suits to recover damages for the injuries they sustained as a result of that boycott from: (1) petitioner International Longshoremen's Association, AFL-CIO ("ILA") under § 303 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 187; and (2) ILA, petitioners New York Shipping Association, Inc. ("NYSA"), Sea-Land Service, Inc. ("Sea-Land"), Seatrain Lines, Inc. ("Seatrain"), and certain other members of NYSA, under §§ 1, 2 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 2 and 3, and § 4 of the Clayton Act, 15 U.S.C. § 15.

B. FACTUAL BACKGROUND

Conex and Twin are non-vessel-owning common carriers authorized by the Federal Maritime Commission to engage in the business of consolidating less-than-container load ("LCL") cargo for shipment between the Port of New York and Puerto Rico. Using Teamster-represented labor, respondents pack or "stuff" small shipments of several customers into large containers at their off-pier facilities and then truck the filled containers to the piers to be loaded aboard ship. Inbound containers, conversely, are picked up at the piers and trucked to respondents' terminals, where they are unpacked or "stripped" and the cargo distributed to its consignees. (App. A at 4a)

[1] References are to pages of the separately bound appendix jointly filed by petitioners in Nos. 78-1902 and 78-1905.

Sea-Land and Seatrain were two of the only three steamship carriers operating between the Port of New York and Puerto Rico.[2] Because their vessels could carry only their own specially-designed containers, no consolidator could remain in the New York-Puerto Rico shipping trade without access to these carriers' empty containers. Prior to 1973, Sea-Land and Seatrain freely provided Conex and Twin with the necessary containers as part of their normal business operations. (App. A at 5a, 7a)

The vehicle for petitioners' attempt to drive Conex and Twin out of business, and thereby to acquire for themselves the work of consolidating LCL cargo lots, was the so-called Rules on Containers ("Rules"). Initially adopted in 1969 as provisions in the 1968-71 collective bargaining agreement between ILA and NYSA, the Rules provided that all containers of consolidated LCL cargo originating from or to be delivered to a point within fifty miles of the Port of New York would be stripped by longshoremen at the piers. Outbound cargo would then be re-stuffed into a container before loading aboard ship; inbound cargo was to be left on the pier for pickup by the consignees.[3] (App. A at 6a; App. C at 77a-78a) The delays, cargo damage and losses and additional charges resulting from this wholly unnecessary rehandling would have made it economically impractical for small shippers to continue using the services of consolidators. (App. A at 47a) But prior to 1973, the Rules were not consistently enforced against anyone. (App. A at 7a)

[2] The third carrier, Transamerica Trailer Transport, Inc., is not a party to these actions. (App. A at 7a n.1)

[3] The Rules were carried forward with only a few slight amendments in the 1971-74 collective bargaining agreement between ILA and the Council of North Atlantic Shipping Associations ("CONASA"), an employer bargaining unit composed of NYSA and employer associations in five other North Atlantic ports. (App. A at 7a)

The situation changed dramatically in early 1973. At a meeting in Dublin, Ireland in January of that year, representatives of CONASA, NYSA and ILA agreed upon new mechanisms for enforcement of the Rules against off-pier consolidators. This agreement, known as "Interpretive Bulletin No. 1" or the "Dublin Supplement," explicitly provided that off-pier consolidators located within fifty miles of the Port of New York were to be considered as operating in "violation" of the Rules. Such "violators" were to be identified and blacklisted, and the steamship carriers agreed not to furnish containers to them. The agreement was to be policed by a joint ILA-NYSA Container Committee. Vessel owners were to be fined $1,000 for each container found on a "violator's" premises. Any consolidator that relocated its terminal beyond the fifty-mile limit would be considered a "runaway shop" and remain subject to the Rules. (App. A at 7a-8a; App. C at 78a-80a)

The boycott of Conex and Twin began almost immediately thereafter. In February, 1973, Sea-Land and Seatrain, using ILA labor, commenced stripping and restuffing Conex's and Twin's outbound LCL containers. Beginning in March, 1973, Sea-Land and Seatrain refused to supply Conex and Twin with empty containers. In April, 1973, NYSA and ILA issued a joint notice to all NYSA members naming fourteen consolidators, including Conex and Twin, as operating in "violation" of the Rules. That notice activated the provision in the Dublin Supplement requiring all NYSA members to refuse containers to the listed companies. (App. A at 8a) These actions had the effect of virtually terminating respondents' business of freight consolidation in the New York-Puerto Rico trade. (App. A at 8a)

C. THE PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD

Faced with the imminent destruction of its business, on June 1, 1973, Conex filed unfair labor practice charges with the National Labor Relations Board ("NLRB"). It alleged that the Rules and Dublin Supplement constituted illegal "hot cargo" agreements under § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), and that ILA's enforcement of those agreements violated the secondary boycott prohibitions of § 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4). The NLRB issued administrative complaints against ILA and NYSA and, acting pursuant to § 10(*l*) of the Act, 29 U.S.C. § 160(*l*), the NLRB's Regional Director petitioned the United States District Court for the District of New Jersey for a preliminary injunction prohibiting continued implementation of the Rules and Dublin Supplement until final disposition of the matter by the Board. (App. A at 8a-9a)

After a lengthy hearing, Judge Lacey found that Conex could not remain in business if enforcement of the Rules continued and, on September 18, 1973, granted injunctive relief. *Balicer* v. *International Longshoremen's Ass'n*, 364 F. Supp. 205 (D.N.J.), *aff'd per curiam*, 491 F.2d 748 (3d Cir. 1973). Following a separate hearing on substantially identical charges filed with the NLRB by Twin, Judge Lacey also granted a preliminary injunction in that case. *Balicer* v. *International Longshoremen's Ass'n*, 86 L.R.R.M. 2559 (D.N.J. 1974). (App. A at 9a)

The Conex and Twin charges were consolidated for hearing before the NLRB.[4] On December 4, 1975, the

[4] The parties stipulated that the extensive records compiled before Judge Lacey, as supplemented by affidavits submitted by intervenor International Brotherhood of Teamsters, Local 807, which represented Conex's employees, and by additional affidavits submitted by ILA and NYSA, would constitute the record for the unfair labor practice proceedings. (App. A at 9a, 20a)

NLRB unanimously concluded that the Rules and Dublin Supplement were "make work" agreements, designed to acquire for petitioners the work of stuffing and stripping LCL containers which traditionally had been performed off-pier by employees outside the longshoremen unit. The Board therefore held that the Rules and Dublin Supplement had no lawful work preservation objective and that, by entering into them, ILA and NYSA had violated § 8(e). The Board further held that ILA had violated the secondary boycott prohibitions of § 8(b)(4)(ii)(B) by attempting to enforce the unlawful agreements. *International Longshoremen's Ass'n (Consolidated Express, Inc.)*, 221 NLRB 956, 961 (1975), *aff'd sub nom. International Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh. denied*, 430 U.S. 911 (1977). (App. A at 9a-11a; App. C at 81a-85a)[5]

D. THE PROCEEDINGS BELOW

The complaints in these cases each allege in Count I that petitioners' refusal to deal and coercive stripping and stuffing of respondents' LCL containers constituted a group boycott of Conex and Twin in violation of §§ 1 and 3 of the Sherman Act.[6] In Count III, Conex and Twin alleged that ILA should respond in damages for the injuries they sustained as a result of the union's unfair labor practice as provided under § 303 of the LMRA. Based upon the NLRB's binding determinations of fact and law, and also upon the express terms and

[5] A petition for reconsideration and recall of mandate was denied by the Second Circuit on December 16, 1977. A subsequent petition to the NLRB to reopen the unfair labor practice hearing was denied on August 12, 1978. (App. A at 11a)

[6] Count II charges all petitioners with monopolizing or attempting to monopolize the business of stuffing and stripping LCL cargo in the Port of New York in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. Summary judgment was not sought as to this count.

admitted implementation of petitioners' agreements, respondents moved for partial summary judgment on the issue of liability on both counts. (App. A at 11a-12a; App. C at 85a-86a)

1. *The Decision of the District Court*

The District Court denied summary judgment on both counts. (App. C at 120a; App. D at 122a) With respect to respondents' § 303 claims, it held that the NLRB's prior decision collaterally estopped ILA from denying that it had committed an unfair labor practice and that the actions were not time-barred under the applicable New Jersey statute of limitations. (App. C at 89a, 95a) In its view, however, if respondents were required to obtain freight forwarder permits from the Interstate Commerce Commission ("ICC"), their failure to do so would bar their recovery under § 303. (App. C at 92a) The District Court also ruled that a defense of equitable estoppel might lie against respondents on these claims if it could be shown that they had engaged in illegal conduct to circumvent enforcement of the Rules prior to 1973. (App. C at 97a)

With respect to respondents' Sherman Act claims, the District Court also held that the NLRB's findings and conclusions were not determinative. (App. C at 108a) In its view, the questions whether petitioners' conduct was immune from antitrust scrutiny under the non-statutory labor exemption doctrine and whether their activities violated the Sherman Act were "inseparable". (App. C at 98a) Refusing to apply the *per se* doctrine of antitrust liability solely because of the labor relations context of these cases, it held that a full-scale rule of reason inquiry was required on the issues of anticompetitive intent and effect. (App. C at 108a-110a, 113a-114a) The District Court further ruled that Conex's and Twin's failure to obtain an ICC permit would, if such a permit were re-

quired, bar recovery of damages under § 4 of the Clayton Act. (App. C at 120a)

The District Court certified its order (App. D at 121a-122a) for interlocutory appeal under 28 U.S.C. § 1292 (b) on February 22, 1978. (App. F at 126a-127a)

2. *The Decision of the Court of Appeals*

The Court of Appeals affirmed the District Court's application of collateral estoppel to the NLRB's unfair labor practice determination and agreed that respondents' § 303 claims were not time-barred under the applicable New Jersey statute of limitations. (App. A at 22a, 26a) Reversing the court below, however, the Third Circuit concluded that, based upon undisputed facts of record, ILA could not establish critical elements of an equitable estoppel defense. (App. A at 32a) The Court of Appeals also rejected ILA's so-called "illegality" defense, viewing it as reminiscent of the long discredited "trespasser on the highway" doctrine. (App. A at 27a, 28a) Accordingly, it ordered that summary judgment be entered against the union on Count III of the complaints. (App. A at 4a, 33a; App. B at 73a) These rulings are the subject of the ILA's petition in *International Longshoremen's Ass'n* v. *Consolidated Express, Inc., et al.*, No. 78-1902.

Turning to respondents' antitrust claims, the Court of Appeals held that since the NLRB had conclusively determined that petitioners' agreements were illegal under the labor laws, nothing in the national labor policy warranted immunizing their conduct from antitrust sanctions. (App. A at 47a-48a, 50a) After finding that the Rules and Dublin Supplement "have horizontal, vertical, and coercive aspects" whose "necessary effect" was to drive Conex and Twin from the New York-Puerto Rico shipping market (App. A at 57a, 58a), the Third Circuit

further held that the container boycott fell within the categories of restraints traditionally deemed *per se* unlawful under the Sherman Act. (App. A at 60a, 61a) Finally, the court rejected petitioners' so-called "illegality" defense as being essentially no different than the *pari delicto* defense rejected in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). (App. A at 63a-65a) These rulings are the subject of the various non-union parties' petition in *New York Shipping Ass'n, Inc., et al.* v. *Consolidated Express, Inc., et al.*, No. 78-1905.

Despite these holdings, the Court of Appeals affirmed the District Court's denial of summary judgment on respondents' antitrust claims. (App. A at 55a, 67a; App. B at 73a) It held that petitioners may yet establish a complete defense to treble damages liability if, on remand, it could be shown that: (1) there was no reasonable foreseeability that the agreements in question would be held to violate the labor laws, and (2) the restraint imposed on the secondary market went no further than was reasonably necessary to accomplish a labor objective thought to have been legitimate. (App. A at 53a-54a) The validity of this defense under § 4 of the Clayton Act is the subject of respondents' Conditional Cross-Petition for a Writ of Certiorari in *Consolidated Express Inc., et al.* v. *New York Shipping Ass'n, Inc., et al.*, filed concurrently herewith. The non-union petitioners in No. 78-1905 seek review of the standards articulated by the Third Circuit for meeting this new defense.

ARGUMENT

A. THE PETITION IN NO. 78-1902

In scattershot fashion, the ILA's petition, No. 78-1902, asserts that there are ten questions for this Court's review concerning the Third Circuit's decision with respect to respondents' § 303 claims. In reality, the Court of Appeals' rulings on these claims reduce to four discrete issues. None raises a novel issue of law and none is sufficiently important to warrant this Court's attention.

1. *Appropriateness of Collateral Estoppel*

Like the court below, every court of appeals which has considered the applicability of the collateral estoppel doctrine in this context since *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), has refused to permit relitigation of an NLRB unfair labor practice determination in a subsequent suit for damages under § 303 of the LMRA.[7] ILA is seeking certiorari in the face of this unbroken line of authority and despite the fact that the decision when to apply collateral estoppel is committed to the "broad discretion" of the lower courts. *Parklane Hosiery Co.* v. *Shore*, 47 U.S.L.W. 4079, 4082 (U.S. Jan. 9, 1979).

ILA asserts that the decision below establishes a new standard of "unfairness" for litigants attempting to avoid the bar of collateral estoppel. It does not. Rather, the Court of Appeals held only that ILA could not show that the NLRB proceeding had been unfair *in these cases.* Since the union had deliberately chosen not to seek or

[7] International Wire v. Local 38, IBEW, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973); Texaco, Inc. v. Operative Plasterers & Cement Masons, 472 F.2d 594 (5th Cir.), *cert. denied*, 414 U.S. 1091 (1973); Paramount Transport Systems v. Teamsters, Local 150, 436 F.2d 1064 (9th Cir. 1971); Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969).

introduce any additional evidence before the NLRB,[8] the Third Circuit reasoned that the alleged inadequacies in the Board's discovery procedures could not have affected the outcome of the NLRB proceeding in any way. *Cf. Parklane Hosiery Co.* v. *Shore*, *supra*, 47 U.S.L.W. at 4082. (App. A at 19a-20a) The decision thus turns entirely upon the particular facts and circumstances of these parties' prior litigation and cannot be deemed an abuse of the lower courts' discretion.

The lengthy history of the NLRB proceedings and the multiplicity of appeals it spawned should itself be sufficient to refute ILA's additional contention that it was denied an "adequate opportunity to litigate" before the Board. The NLRB, the Second Circuit and the Third Circuit have already refused to permit ILA to relitigate the Board's unfair labor practice determination. *See* note 5, *supra.* Given that this Court considered these same arguments and denied certiorari when it was sought directly in the NLRB cases,[9] ILA's newest collateral attack on the Board's decision should not occupy this Court's attention.

[8] *See* note 4, *supra.* ILA also assured the administrative law judge that "there [were] no material issues of credibility in the record before the [Board] for resolution requiring a formal hearing," and that the unfair labor practice charges "[could] be fully resolved on the basis of the exhibits and transactions of testimony entered in the [preliminary injunction hearing]." (App. A at 20a)

[9] ILA vigorously argued its disagreement with the Board's definition of the "work in controversy" and pressed its own version of the alleged "facts" pertaining to respondents' history of off-pier consolidating work in the preliminary injunction hearing before Judge Lacey, Balicer v. International Longshoremen's Ass'n, *supra*, 364 F. Supp. 214-16; and, thereafter, to the NLRB's administrative law judge, *see* 221 NLRB at 971-74; to the Board, *see* 221 NLRB at 959-60; to the Second Circuit, *see* 537 F.2d at 711; and twice before to this Court. *See* Petition for a Writ of Certiorari, International Longshoremen's Ass'n v. NLRB, No. 76-570, at 10, 12; Joint Petition for Rehearing of Orders Denying Petitions for a Writ of Certiorari, New York Shipping Ass'n, Inc. v. NLRB, No. 76-569; International Longshoremen's Ass'n, No. 76-570, at 3.

2. *Sufficiency of Equitable Estoppel Defense*

In rejecting the ILA's claimed equitable estoppel defense, the Third Circuit did nothing more than apply settled law to the uncontroverted facts of record (App. A at 31a-32a) Despite ILA's present contention that the court below misapplied the standards for a grant of summary judgment, it has previously conceded that the Third Circuit's approach to resolution of the equitable estoppel claim *"was, of course, appropriate to a traditional motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure."* [10]

The Court of Appeals found that ILA could not make out the elements of an equitable estoppel defense. ILA, in effect, is asking this Court to do nothing more than review the sufficiency of the evidence supporting that decision. Since the relevant facts urged by respondents in support of the motion and relied upon below appeared in affidavits and documentary materials authored or submitted by ILA (*e.g.*, App. A at 32a & n.14), nothing in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970), or in Rule 56(c), Fed. R. Civ. P., required respondents to submit additional evidence to show that ILA's admissions were undisputed or to disprove ILA's unsupported and nonmaterial factual allegations.[11]

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[10] Petition for Rehearing Not In Banc, filed by ILA in the Third Circuit on April 27, 1979, at 4 (emphasis supplied). For the convenience of the Court, a copy of this petition has been lodged with the Clerk.

[11] There is no truth to ILA's bald assertion that respondents "conceded the facts" purportedly relevant to this defense. The NLRB's administrative law judge found ILA's charges that respondents engaged in illegal conduct to avoid enforcement of the Rules unpersuasive, 221 NLRB at 971, and respondents have objected to ILA's persistent interjection of these baseless slurs at every stage of this proceeding. The Court of Appeals in no way "precluded" ILA from presenting its evidence; there simply is none.

3. *Statute of Limitations*

Contrary to ILA's contention, there is no conflict between *Cope* v. *Anderson*, 331 U.S. 461 (1947), and the Third Circuit's decision that the statute of limitations governing federal rights of action under § 303 should be determined by reference to federal statutory policy instead of the complicated conflicts of law analysis applicable to suits arising under state law. (App. A at 25a) Indeed, if *Cope* were dispositive of the question presented here, as ILA claims, then this Court's subsequent reservation of decision on precisely this issue in *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.8 (1966), would have been meaningless.

But since *Cope* involved the application of a state's "borrowing statute," it may easily be distinguished from the instant cases. Statutory borrowing rules, where they have been enacted, are part and parcel of the state's statute of limitations; one cannot be applied without the other.[12] There is no similar reason, however, to apply non-statutory conflicts of law principles designed to reconcile competing state interests when the cause of action is federally created.[13] To the contrary, this Court has previously stated that the questions of which state statute is to be borrowed and how it is to be applied to a federal right of action without an express limitations period are federal law questions to be resolved in light of the underlying statutory policy. *UAW* v. *Hoosier Cardinal Corp.*,

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[12] The two circuit court decisions ILA relies upon, Arneil v. Ramsey, 550 F.2d 774, 779 (2d Cir. 1977); Burns v. Union Pacific Railroad, 564 F.2d 20, 21-22 (8th Cir. 1977), likewise involved application of statutory borrowing rules.

[13] ILA's reliance upon the *Rules of Decision Act*, 28 U.S.C. § 1652, is misplaced. That statute, as it has consistently been interpreted since Erie Railroad Co. v. Tompkins, 304 U.S. 64, 72-73 (1938), deals only with the law governing causes of action arising under state law. *E.g.*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

supra, 383 U.S. at 701; *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946). The decision below is fully consistent with these precedents.

There is an additional reason why the Third Circuit's statute of limitations ruling is particularly ill-suited for a grant of certiorari. Both courts below agreed that the statute of limitations governing respondents' § 303 claims would be that of New Jersey even under the conflicts analysis which ILA seeks to have this Court impose. (App. A at 26a n.12; App. E at 123a-125a) There is no reason therefore to expect any different outcome if such an analysis were required.[14]

4. *Sufficiency of "Illegality" Defense*

ILA does not cite a single case in which an "illegality" defense has been recognized in a § 303 action, and neither the District Court nor respondents has been able to find one. The defense is not recognized by the NLRB in unfair labor practice cases, *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, 236 NLRB No. 42 (1978), *appeal pending sub nom. International Longshoremen's Ass'n* v. *NLRB* (D.C. Cir. No. 78-1510); *NLRB* v. *Springfield Building & Construction Trades Council*, 262 F.2d 494 (1st Cir. 1958), or under analogous federal statutes, *see infra* at 22-24.

ILA's only argument in support of the petition is that the decision below conflicts with the holding in *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 260 (1964), that the § 303 remedy is compensatory in nature. But that

[14] ILA finally urges this Court to "establish a uniform national limitations period" applicable to § 303 actions and suggests that the six-month statute of limitations for unfair labor practice charges be adopted. An identical invitation was expressly rejected in UAW v. Hoosier Cardinal Corp., *supra*, 383 U.S. at 701-703, *distinguishing* Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962), and for the reasons stated there, ILA's invitation should likewise be rejected.

case holds only that punitive damages are not recoverable under § 303. Since respondents do not seek punitive damages, there is no conflict. Moreover, Congress clearly believed that "the threat of a suit for damages [would be] a tremendous deterrent to the institution of secondary boycotts",[15] and *Morton* does not suggest otherwise. As recognition of an "illegality" defense would undermine this underlying statutory purpose, its rejection by the Third Circuit signifies no departure from settled legal principles.

B. THE PETITION IN NO. 78-1905

1. *Review of the Third Circuit's Antitrust-Related Rulings Is Premature*

The petition in No. 78-1905 presents four questions directed at the Third Circuit's interlocutory rulings with respect to respondents' Sherman Act claims. Since the Court of Appeals affirmed the District Court's *denial* of summary judgment on the antitrust claims and remanded the cases for a determination by the lower court as to whether petitioners can establish a complete defense to treble damages liability under § 4 of the Clayton Act, all of the Questions Presented by the petition are premature for review by this Court.

If petitioners are successful on remand, there will be no need for this Court to pass upon the antitrust issues they now raise. If petitioners are unsuccessful, they will have full opportunity to seek the Court's review after the proceedings below are concluded. By seeking certiorari at this time, petitioners are asking this Court to rule upon issues which ultimately may have no impact on the outcome of these cases. For this reason alone, the petition

[15] 93 CONG. REC. 5060 (1946); II Leg. Hist. of Labor-Management Relations Act of 1947, at 1371 (remarks of Sen. Taft, author of the bill which became § 303(b)), *cited in* Twin Excavating Co. v. Garage Attendants Local 731, 337 F.2d 437, 438 (7th Cir. 1964).

in No. 78-1905 should be denied. Moreover, as will be demonstrated below, the decision of the Court of Appeals is not in conflict with any decision of this Court or any decision of another Court of Appeals. There is no need, therefore, for the Court to decide these questions until the factual record has been fully developed and the proceedings below are concluded.

2. *The Decision Does Not Conflict With Other Non-Statutory Labor Exemption Decisions*

In holding that petitioners' conduct was not entitled to antitrust immunity, the Third Circuit reasoned that an illegal "work acquisition" agreement is neither a mandatory subject of collective bargaining nor a legitimate union interest that "falls within the protection of the national labor policy." (App. A at 47a-48a)[16] That ruling is firmly supported by this Court's decisions requiring that the availability of the non-statutory labor exemption be determined "in the light of the national labor policy" as it is expressed in the National Labor Relations Act. *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965) (White, J.); *id.* at 710 n.18, 732-33 (Goldberg, J., concurring and dissenting); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665-67 (1965); *see also Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616, 622-23, 626 (1975). Absent an intercircuit conflict, therefore, there is no need for this Court to reiterate these principles.

Petitioners purport to find such a conflict with the Second Circuit's decisions in *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970) (*"ICTC"*); and *Commerce Tankers Corp.* v. *National Maritime Union*, 553 F.2d 793 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977). But *ICTC* did

[16] "Work acquisition," far from being encouraged or promoted, is strongly condemned by the national labor policy. NLRB v. Enterprise Ass'n of Pipefitters, 429 U.S. 507, 528 n.16 (1977).

not consider the question whether a prior unfair labor practice determination by the NLRB would remove the non-statutory labor exemption and, therefore, is not on point.[17] As for *Commerce Tankers*, the Second Circuit's actual holding was that it would be "inappropriate for us to decide" whether the NLRB's prior unfair practice decision removed the labor exemption because the District Court had not ruled on the issue and it had been briefed to the Court of Appeals by only one party. 553 F.2d at 802. The Second Circuit's comments on the scope of the labor exemption therefore are merely *dicta*. None of the remaining cases cited by petitioners involved a prior NLRB adjudication that the specific conduct alleged violated the National Labor Relations Act and, for this reason, all are distinguishable from the decision below.[18]

[17] It is also important to note that *ICTC* did not uphold the validity of the Rules as petitioners claim. Rather, the Second Circuit's opinion in *ICTC* was rendered only in the context of a motion for a preliminary injunction; the case never proceeded to a determination on the merits either by the court or by the NLRB. Moreover, *ICTC* was decided before the NLRB struck down the Rules as illegal under the labor laws in *International Longshoremen's Ass'n (U.S. Naval Supply Center)*, 195 NLRB 273 (1972); before the Rules were augmented by the boycott provisions of the Dublin Supplement; and before the full emergence of the non-statutory labor exemption doctrine in Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975). (App. A at 21a n.11, 22a)

[18] The Third Circuit's analysis is consistent, however, with the views expressed by several other circuits. *E.g.*, Ackerman-Chillingworth v. Pacific Electrical Contractors Ass'n, 579 F.2d 484, 503 (9th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3465 (U.S. Jan. 9, 1979) (Hufstedler, J., concurring and dissenting); Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) ("federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining"), *accord*, McCourt v. California Sports, Inc., 1979-1 CCH Trade Cas. ¶ 62,649 (6th Cir. May 22, 1979); National Ass'n of Women's & Children's Apparel Salesmen, Inc. v. FTC, 479 F.2d 139, 144 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973) ("the antitrust laws yield only insofar as the union pursues legitimate subjects of collective bargaining").

3. *Review of the Standards Formulated Under the Third Circuit's "Labor Policy" Defense Is Premature*

Petitioners claim that the Third Circuit improperly merged the issues of antitrust immunity and antitrust violation and, by so doing, formulated a new labor "exemption" test. That contention either misapprehends or mischaracterizes the decision below. The Court of Appeals carefully separated these issues and unequivocally rejected petitioners' claim of antitrust immunity: "[W]e hold that enforcement of [the] Rules and Dublin Supplement was not exempt under the Sherman Act." (App. A at 50a) Only after disposing of the antitrust "exemption" issue did the Third Circuit go on to fashion a limited "defense" to the treble damages sanction of § 4 of the Clayton Act. (App. A at 51a-54a)

To establish this defense, the Court of Appeals stated that petitioners, on remand, must demonstrate that: (1) there was no reasonable foreseeability that their agreements would be held to violate the national labor laws, *and* (2) the restraint imposed on the secondary market went no further than reasonably necessary to accomplish a labor objective they thought was legitimate. (App. A at 54a). Essentially, petitioners ask the Court to review the appropriateness of these standards. But that assumes the validity of such a defense in the first instance. As pointed out in respondents' Conditional Cross-Petition for a Writ of Certiorari, filed concurrently herewith, the Third Circuit's creation of a previously unknown "labor policy" defense to a private litigant's right to recover damages for antitrust injuries conflicts with two lines of this Court's precedents—those affording a broad remedial scope to § 4 of the Clayton Act and those delineating the scope of the non-statutory labor exemption. Since the availability of this defense is doubtful

under any circumstances, this Court might never need to reach the subsidiary question posed by petitioners.

Moreover, it is important to note that petitioners seek review only of the *second* element of the Third Circuit's two-pronged conjunctive test. It would be unnecessary for the District Court even to consider this criterion unless petitioners are *first* able to show that a reasonable collective bargainer could not have foreseen the ultimate invalidation of the Rules. As the Court of Appeals pointed out, "[petitioners'] burden of proving lack of foreseeability is formidable, considering the NLRB decision in *International Longshoremen's Assn., Local 1248 (U.S. Naval Supply Center)*, 195 N.L.R.B. 273 (1972), which held that the Rules were illegal over a year before the Dublin meeting." (App. A at 55a) Given the unlikelihood that petitioners will be able to prevail on this threshold issue, the question whether the second element of the test is unduly strict may be wholly immaterial. There is no reason, therefore, for this Court to review the decision below until the availability of the defense is determined in the first instance by the District Court.

Petitioners finally rest their argument upon speculative predictions of dire consequences if antitrust standards must be taken into account during collective bargaining. The short and complete response is that this Court already has explicitly rejected the notion that unions and employers may ignore the antitrust laws when they are seated at the bargaining table. *United Mine Workers* v. *Pennington*, *supra*, 381 U.S. at 664-65 ("because they must bargain does not mean that the agreement reached may disregard other laws"); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 (1940) ("we must regard the question whether labor unions are to some extent and in some circumstances subject to the [Sherman] Act as settled in the affirmative").

4. *Application of the* Per Se *Doctrine Does Not Conflict With Any Other Decisions*

The Court of Appeals held that once the labor exemption is found inapplicable, the challenged conduct should be scrutinized under conventional antitrust principles, including, where appropriate, the *per se* doctrine. (App. A at 56a, 59a) That holding is entirely consistent with the precedents of this Court. In *Apex Hosiery Co.* v. *Leader*, *supra*, the Court explicitly stated that apart from the express limitations upon the reach of the antitrust laws set forth in the Clayton Act, the Sherman Act "makes no distinctions between labor and non-labor cases" and requires an "impartial application" to the "activities of industry and labor alike." *Id.*, 310 U.S. at 512. All of the members of the Court likewise agreed in *Pennington* and *Jewel Tea* that "settled antitrust principles" would be "appropriate and applicable" in determining whether non-exempt union-employer activities violate the antitrust laws. *Meat Cutters* v. *Jewel Tea Co.*, *supra*, 381 U.S. at 693 n.6 (White, J.); *id.* at 715 (Goldberg, J., concurring and dissenting); *id.* at 736-37 (Douglas, J., dissenting); *United Mine Workers* v. *Pennington*, *supra*, 381 U.S. at 673 (Douglas, J., concurring).

None of the cases cited by petitioners supports the proposition that anticompetitive labor agreements are exempt from *per se* analysis. Two of the cases, *Gough* v. *Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3571 (U.S. Feb. 27, 1979); and *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (*en banc*), *cert. denied*, —— U.S. ——, 99 S.Ct. 340 (U.S. Oct. 30, 1978), did not involve a labor agreement at all. Moreover, rather than repudiating the *per se* doctrine, both cases hold only that the particular conduct alleged did not fit within the categories of concerted

refusals to deal which traditionally are deemed *per se* unlawful. In the other cases cited, *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); and *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), application of the *per se* rule was deemed inappropriate because of the peculiar economic characteristics of professional sports leagues, the setting in which those cases arose. Neither case suggests the need for a rule of reason inquiry in the instant cases.[19]

In sum, the Third Circuit's decision merely applies "settled antitrust principles" to the uncontroverted facts of record.[20] Contrary to petitioners' assertion, other courts have likewise applied the *per se* doctrine to anticompetitive labor activities where the nature of the restraint alleged has made that level of antitrust scrutiny appropriate. *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970); *Morse Bros., Inc.* v. *International Union of Operating Engineers*, 1974-2 CCH

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[19] Significantly, the only rationale petitioners have ever advanced for engaging in a rule of reason analysis in these cases is the labor policy favoring collective bargaining. As the Third Circuit pointed out, these arguments do not relate to any pro-competitive effects of the Rules and Dublin Supplement and would be foreclosed under the rule of reason in any event. National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978). (App. A at 60a) Petitioners understandably have never claimed that their agreements had a pro-competitive effect.

[20] The record below amply supports the Third Circuit's factual findings that respondents were competitors as well as customers of Sea-Land and Seatrain and, therefore, that the container boycott had both horizontal and vertical aspects. *See, e.g.*, Joint Appendix on Appeal from the United States District Court for the District of New Jersey, filed in the court below, at 238-39, 252, 263, 323, 327-28. Sea-Land's and Seatrain's facilities for consolidating LCL cargo are also described in Judge Lacey's opinion, Balicer v. International Longshoremen's Ass'n, *supra*, 364 F. Supp. at 218, and Sea-Land's LCL consolidation work is detailed in Sea-Land Service, Inc. v. Director, Office of Wkmn's Comp. Programs, 552 F.2d 985, 989-90 & nn.4, 6, 7 (3d Cir. 1977).

Trade Cas. ¶ 75,412 (D. Ore. 1974). *Cf. Ackerman-Chillingworth* v. *Pacific Electrical Contractors Ass'n*, *supra*, 579 F.2d at 490 n.7 (Ely, J.); *id.* at 496-99 (Hufstedler, J., concurring and dissenting). That mode of analysis creates no inexorable rules of decision and, as it is clearly required by this Court's precedents, does not warrant a grant of certiorari.[21]

5. *Rejection of the "Illegality" Defense*

Relying upon *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), the Third Circuit rejected petitioners' so-called "illegality" defense as insufficient as a matter of law to bar respondents' recovery of damages under § 4 of the Clayton Act.[22] That decision is in accord with the overwhelming weight of judicial authority.

Petitioners rely principally upon the Tenth Circuit's decision in *Cottonwood Mall Shopping Center, Inc.* v. *Utah Power & Light Co.*, 440 F.2d 36 (10th Cir.), *cert. denied*, 404 U.S. 857 (1971). That case is factually distinguishable because it involved alleged injury to a *prospective*

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[21] Petitioners' argument is not helped by Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). While holding *per se* rules inapropriate in cases involving vertical territorial restraints, the Court there confirmed that horizontal restraints of trade would remain subject to analysis under the *per se* doctrine. *Id.* at 58 n.28. *See also* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 541-45 (1978).

[22] Petitioners' Fourth Question Presented implies that respondents have been operating illegally. Again, this mischaracterizes the record. As the Third Circuit pointed out, "Conex and Twin have always asserted that they are not freight forwarders within the meaning of Part IV of the Interstate Commerce Act, 49 U.S.C. § 1002(a)(5)(A), and that the operating authority granted them by the Federal Maritime Commission (FMC) sufficed." (App. A at 26a-27a) Respondents' position has always been that the lack of Part IV permits, *even if required*, cannot as a matter of law bar them from maintaining these actions.

business for which plaintiffs had been unable to obtain necessary licenses. Moreover, *Cottonwood* must be regarded as of doubtful authority in any event since the same circuit has subsequently rejected "illegality" defenses premised upon alleged violations of unrelated licensing statutes on four occasions: *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670 (10th Cir. 1977); *Lamp Liquors, Inc.* v. *Adolph Coors Co.*, 563 F.2d 425 (10th Cir. 1977); *Adolph Coors Co.* v. *A&S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977); and *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972).[23]

None of the other cases relied upon by petitioners supports a contrary result. Two were decided before this Court's 1968 decision in *Perma Life* effectively put an end to "illegality" defenses;[24] two are District Court decisions which, like *Cottonwood*, involved plaintiffs who were seeking *prospectively* to enter businesses for which they had been unable to obtain the necessary licenses;[25] and the last is also a District Court decision which, moreover, involved an inherently unlawful business.[26] Re-

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[23] The Ninth Circuit has likewise rejected the defense of "contributory illegality," Memorex Corp. v. IBM Corp., 555 F.2d 1379 (9th Cir. 1977); as the Third Circuit has done on two previous occasions, Health Corp. of America, Inc. v. New Jersey Dental Ass'n, 424 F. Supp. 931 (D.N.J. 1977), *mandamus denied without opinion sub nom.* New Jersey Dental Ass'n v. Brotman, No. 77-1268 (3d Cir. Feb. 24, 1977), *mandamus denied*, 434 U.S. 812 (1977); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975).

[24] Okefenokee Rural Electric Mem. Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954); Maltz v. Sax, 134 F.2d 2 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943).

[25] American Bankers Club, Inc. v. American Express Co., 1977-1 CCH Trade Cas. ¶ 61,247 (D.D.C. Jan. 18, 1977); Heath v. Aspen Skiing Corp. 325 F.Supp. 223 (D. Colo. 1971).

[26] Pearl Music Co. v. Recording Industry Ass'n of America, Inc., 460 F.Supp. 1060 (C.D. Calif. 1978) (record piracy).

spondents are aware of no appellate decision since *Perma Life* which has held that an antitrust plaintiff's non-compliance with an unrelated licensing statute prevents it from pursuing antitrust remedies for injuries to an *existing* business.

CONCLUSION

For all of the reasons stated, the petitions in Nos. 78-1902 and 78-1905 should be denied.

Respectfully submitted,

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Dated: August 10, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1902

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,
Respondents.

No. 78-1905

NEW YORK SHIPPING ASSOCIATION, INC., *et al.*,
Petitioners,

v.

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1902

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,

Respondents.

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NEW YORK SHIPPING ASSOCIATION, INC., ET AL.,

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

This reply is submitted by petitioners in response to the Memorandum filed by the United States as Amicus Curiae.

1. This Case Is Now Ripe For Review

The single most significant feature of this case, which is not disputed by the United States or by any party, is that it presents for review novel and substantial questions of national importance, principally involving the proper elements of the test for the non-statutory labor exemption from the antitrust laws. The United States admits that this has been "a vexing issue for decades", and that the contention of all parties "that the court [of Appeals] committed significant error in shaping this exemption" is "not without force".[1] Nevertheless, the United States suggests that review by this Court is premature because the Third Circuit's determination is interlocutory and because the validity under federal labor law of the collectively bargained provisions, challenged in this case under the antitrust laws, is unsettled.[2] Undoubtedly, these points were well known to the Court when it requested the views of the United States. Petitioners submit that the arguments set forth by the Government are precisely the reasons why this Court should review and settle the controversy at this time.

The United States does not maintain that this Court should not entertain review of this case. Instead, it suggests that its review be postponed, either by presently denying the petitions, or perhaps by holding them in abeyance pending the final adjudication of the related labor law

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[1] *See,* Memorandum for the United States as Amicus Curiae (hereinafter "U.S. Memo") at 4.

[2] *Compare International Longshoremen's Ass'n* v. *NLRB,* Nos. 77-1735, 77-1758 and 78-1510 (D.C. Cir. Sept. 25, 1979) *with International Longshoremen's Ass'n* v. *NLRB,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977). *See generally,* Pet. for Cert. in No. 78-1905 at 8, n. 6 and Supplemental Brief for Petitioners in Nos. 78-1902 and 78-1905.

litigation.[3] Petitioners submit that this suggestion is unsound and that this case is ripe for review now.

The attempt by the United States to apply ordinary principles of finality ignores the exceptional appellate treatment rendered to this case by the courts below. The substantial questions of law presented provoked both the District Court and the Third Circuit to grant the extraordinary remedy of an interlocutory appeal under 28 U.S.C. § 1292 (b). The § 1292(b) posture of this case conclusively establishes the propriety of immediate review to resolve "controlling question[s] of law as to which there is a substantial ground for difference of opinion".

The determination of these pure legal questions need not await a trial on remand. A trial would be concerned not with the soundness, wisdom and proper contours of the Third Circuit's labor exemption test, but rather with its *post hoc* application. There already exists a full and complete factual record germane to the exemption issue.

Nor does resolution of the antitrust issue presented by this case depend upon the ultimate outcome of the unsettled labor law litigation. The doctrine of labor exemption is not contingent upon an adjudication of the challenged labor contract under federal labor law. *Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 684-87 (1965). The effect of the Third Circuit's version of the exemption has universal application to all pending and future collective bargaining negotiations and agreements nationwide.[4]

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[3] *See,* U.S. Memo at 5.

[4] Apart from the issues relating to the appropriate test for the non-statutory labor exemption, this case also presents for review (1) the choice of the *per se* or rule of reason standard for adjudicating non-exempt labor agreements under the antitrust laws; (2) the standing of illegal business enterprises to seek re-

(footnote continued on following page)

2. Immediate Review Will Further The Public Interest

The approach counseled by the United States would thwart the objective of both the Court of Appeals and District Court for a final appellate resolution of the legal issues in this case to "materially advance the ultimate termination of the litigation". 28 U.S.C. § 1292(b). Until these issues have been dispositively determined by this Court, any further proceedings on remand to the District Court would be unaided by this Court's guidance and thus potentially wasteful. These protracted proceedings would ultimately have to be unscrambled and repeated in light of any reversal or modification by this Court if and when it later accepts this case for review after lengthy remand and second appeal.

More importantly, however, the resolution of the substantial questions of federal law in this case will directly and materially prevent volatile labor-management confrontations in a vital national industry. For more than two decades labor and management in the longshore industry have grappled with the difficult problems of job security and work preservation occasioned by technological job displacement. Many lengthy longshore strikes in 1959, 1962, 1964, 1968, 1971, 1975 and 1977 on the East and Gulf Coasts of the United States were the direct result of the parties' contention over these thorny issues. These strikes had a harmful and irreparable impact upon the national economy.

(footnote continued from preceding page)

dress under the antitrust laws and under LMRA § 303; (3) the propriety of collateral estoppel; (4) violations of due process and/or Rule 56 of the Federal Rules of Civil Procedure in the granting of summary judgment; (5) misconstruction of the purely compensatory nature of LMRA § 303; and, (6) the appropriate statute of limitations applicable to LMRA § 303. *See*, Pet. for Cert. in No. 78-1905 at 2-3, 17-20; Pet. for Cert. in No. 78-1902 at 12-23. These important issues are completely unrelated to the ultimate adjudication of the merits of any peripheral NLRB litigation.

The decision of the Court of Appeals in this case places bargaining parties, such as petitioners, in the perilous position of determining, in the midst of heated labor negotiations, whether the bargain arrived at represents the "least restrictive alternative". According to the Third Circuit, a wrong answer exposes them to treble damages. This dilemma radically alters not only the forthcoming 1980 negotiations in the longshore industry on the East and Gulf Coasts, which will commence in the Spring of 1980, but labor negotiations nationwide. Consequently, the potential for labor strife in the longshore and other collective bargaining negotiations has been heightened substantially.

It is thus within the public interest for the Court to grant certiorari at this time. If the Court prefers not to decide this case at this juncture, petitioners respectfully urge that, at the very least, it should grant certiorari and hold this case in suspension pending the final outcome of the labor law litigation.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Dated: New York, New York
December 6, 1979

Respectfully submitted,

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ERNEST L. MATHEWS, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1902

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,

Respondents.

No. 78-1905

NEW YORK SHIPPING ASSOCIATION, INC., *et al.*,

Petitioners,

v.

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL REPLY MEMORANDUM FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1902

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,

Respondents.

No. 78-1905

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.,

Petitioners,

v.

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL REPLY MEMORANDUM FOR PETITIONERS

This supplemental reply is filed, pursuant to Rule 24(5) of the Rules of this Court, to bring to the Court's atten-

tion the recent orders, dated December 13, 1979, of the United States Court of Appeals for the District of Columbia Circuit denying the petitions for rehearing *en banc* in *International Longshoremen's Ass'n* v. *NLRB,* —— F.2d ——, 102 L.R.R.M. 2361 (D.C. Cir. Sept. 25, 1979) (Nos. 77-1735, 77-1758 & 78-1510) (hereinafter "*ILA*"). Copies of these orders are reproduced as an addendum hereto.

The District of Columbia Circuit has now finally determined, contrary to the earlier decision of the Second Circuit in *International Longshoremen's Ass'n* v. *NLRB,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977), that the identical collectively bargained Rules on Containers challenged in this case under the antitrust laws are lawful work preservation provisions under federal labor law. In view of this intercircuit conflict, petitioners, New York Shipping Association, Inc. and International Longshoremen's Association, AFL-CIO, are filing simultaneously herewith petitions for certiorari in *ILA.*

As petitioners advocated in their Supplemental Brief, filed in this case on October 2, 1979, the District of Columbia Circuit's decision in *ILA* underscores the importance of the interrelated labor/antitrust issues presented in this case. In view of the denial of rehearing *en banc* in *ILA,* the suggestion raised by the United States that review of this case would be premature until the labor law issues have been settled is no longer warranted. These labor law questions are now before this Court. No sound reason exists to refuse to entertain simultaneously the related and exceptionally important issues in this case, which merit review in their own right.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Dated: New York, New York
December 31, 1979

Respectfully submitted,

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ADDENDUM

Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,

Petitioner

v.

National Labor Relations Board,

Respondent

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; McGowan, Tamm, Leventhal,* Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by respondent Board having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

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* Circuit Judge Leventhal considered this matter but died before the order issued.

Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

ORDERED, by the Court, *en banc,* that respondent's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judges Tamm, MacKinnon, Robb, and Wilkey would grant respondent's suggestion for rehearing *en banc.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,

Petitioner

v.

National Labor Relations Board,

Respondent

Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; McGowan, Tamm, Leventhal,* Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by intervenor Houff Transfer, Inc., having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc,* that intervenor's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judges Tamm, MacKinnon, Robb, and Wilkey would grant intervenor's suggestion for rehearing *en banc.*

---

* Circuit Judge Leventhal considered this matter but died before the order issued.

Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,

Petitioner

v.

National Labor Relations Board,

Respondent

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by intervenor Tidewater Motor Truck Association having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

ORDERED, by the Court, *en banc*, that intervenor's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judges Tamm, MacKinnon, and Robb would grant intervenor's suggestion for rehearing *en banc*.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1510 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and New York Shipping Association, Inc.,

Petitioners

v.

National Labor Relations Board,

Respondent

Dolphin Forwarding, Inc.,
Tidewater Motor Truck Association,

Intervenors

Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by intervenor Dolphin Forwarding, Inc., having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc,* that intervenor's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judges Tamm, MacKinnon, and Robb would grant intervenor's suggestion for rehearing *en banc.*

Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,
Petitioner

v.

National Labor Relations Board,
Respondent

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; Robinson and Robb, Circuit Judges

ORDER

Upon consideration of respondent's (Board) petition for rehearing, it is

ORDERED, by the Court, that respondent's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,

Petitioner

v.

National Labor Relations Board,

Respondent

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; Robinson and Robb, Circuit Judges

ORDER

Upon consideration of intervenor's (Houff Transfer, Inc.) petition for rehearing, it is

ORDERED, by the Court, that intervenor's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,

Petitioner

v.

National Labor Relations Board,

Respondent

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; Robinson and Robb, Circuit Judges

ORDER

Upon consideration of intervenor's (Tidewater Motor Truck Assoc.) petition for rehearing, it is

ORDERED, by the Court, that intervenor's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1510 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and New York Shipping Association, Inc.,
Petitioners

v.

National Labor Relations Board,
Respondent

Dolphin Forwarding, Inc.,

Tidewater Motor Truck Association,
Intervenors

BEFORE: Wright, Chief Judge; Robinson and Robb, Circuit Judges

ORDER

Upon consideration of intervenor's (Dolphin Forwarding, Inc.) petition for rehearing, it is

ORDERED, by the Court, that intervenor's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Nos. 78-1902, 78-1905 and 79-221

In the Supreme Court of the United States

OCTOBER TERM, 1979

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, PETITIONERS

v.

CONSOLIDATED EXPRESS, INC., ET AL.

NEW YORK SHIPPING ASSOCIATION, INC., ET AL., PETITIONERS

v.

CONSOLIDATED EXPRESS, INC., ET AL.

CONSOLIDATED EXPRESS, INC., ET AL., CROSS-PETITIONERS

v.

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.

ON PETITIONS AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1902
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, PETITIONERS
v.
CONSOLIDATED EXPRESS, INC., ET AL.

No. 78-1905
NEW YORK SHIPPING ASSOCIATION, INC., ET AL., PETITIONERS
v.
CONSOLIDATED EXPRESS, INC., ET AL.

No. 79-221
CONSOLIDATED EXPRESS, INC., ET AL., CROSS-PETITIONERS
v.
NEW YORK SHIPPING ASSOCIATION, INC., ET AL.

ON PETITIONS AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation of October 9, 1979.

1. Petitioners International Longshoremen's Association ("ILA") and New York Shipping Association ("NYSA") negotiated Rules on Containers ("Rules") as part of their 1969 collective bargaining agreement. The

rules provided that all consolidated less-than-container-load ("LCL") or less-than-trailer load ("LTL") cargoes shipped from, or to be shipped to, a point within 50 miles of docks located in New York would be loaded or unloaded ("stuffed" or "stripped") by longshoremen at dockside (Pet. App. 6a). Carriers who failed to comply were subjected to penalties. *Ibid.* Respondents Consolidated Express ("Conex") and Twin Express ("Twin") are companies which, using Teamsters union labor, consolidate freight in containers for ocean shipment between New York and Puerto Rico.

The NYSA's failure to enforce the Rules led to a supplementary agreement ("Dublin Supplement") in January 1973 (Pet. App. 7a). In accordance with the Dublin Supplement, vessel owners using ILA labor (including petitioner Sea-Land) began stripping and restuffing containers previously stuffed by Conex and Twin, and refused to furnish Conex and Twin with empty containers (Pet. App. 8a). NYSA and ILA then issued a joint statement to NYSA members that Conex, Twin and other consolidators were operating in violation of the Rules. *Ibid.*

In June 1973, Conex and Twin filed charges with the National Labor Relations Board ("Board") (Pet. App. 8a). The Board held that of the Rules and their enforcement by the ILA constituted an unfair labor practice under Sections 8(e) and 8(b)(4)(ii)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(e) and 158(b)(4)(ii)(B). *Consolidated Express, Inc.*, 221 N.L.R.B. 956 (1975), enforced, *International Longshoremen's Association* v. *NLRB*, 537 F. 2d 706 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977).

After conclusion of the NLRB proceedings, Conex and Twin filed a complaint in the district court claiming that

enforcement of the Rules and Dublin Supplement constituted both a group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and a violation of Section 303(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. 187(a) (Pet. App. 11a). Actual damages were claimed for the alleged LMRA violation and treble damages were claimed for the alleged antitrust violation. Conex and Twin moved for partial summary judgment on the ground that the NLRB decision, enforced by the Second Circuit, established all of the material facts on the issue of liability (Pet. App. 11a-12a). The district court denied the motion (Pet. App. 121a-122a), but certified the case for interlocutory review pursuant to 28 U.S.C. 1292(b) (Pet. App. 126a-127a).

The court of appeals reversed the district court's order denying partial summary judgment on the LMRA claim (Pet. App. 4a). It found that the NLRB's prior adjudication of an unfair labor practice collaterally estopped relitigation of liability (Pet. App. 15a-22a). It further held that the action was not barred by the statute of limitations (Pet. App. 22a-26a), by possible violations of the Interstate Commerce Act (*id.* at 26a-29a), or by the doctrines of estoppel en pais, laches or equitable estoppel (*id.* 29a-33a).

On the antitrust issue the court held that an agreement which violates Section 8(e) of the NLRA forfeits any claim to labor immunity from the antitrust laws, insofar as the plaintiff seeks injunctive relief. It thus concluded that partial summary judgment would be proper on an injunctive claim, because of the "significant and uncontested" anticompetitive effect of the Rules and the Dublin Supplement (Pet. App. 47a). It held, however, that, where a claim for treble damages is made, the defendants might still assert a labor exemption as an

affirmative defense if they could make a three-fold showing (Pet. App. 51a). They must show that: (1) "they could not reasonably have foreseen that the subject matter of the agreement being challenged would be held to be unlawful under §8(b)(4) or § 8(e) * * *"; (2) the contract provisions and their enforcement "were 'intimately related' to the object of collective bargaining thought at the time to be legitimate * * *"; and (3) the provisions and their implementation "went no further in imposing restraints in the secondary market than was reasonably necessary to accomplish it" (Pet. App. 54a). Finally the court concluded that, in the absence of a labor exemption, the agreements involved in this case, as implemented by petitioners, constituted group boycotts and as such were per se violations of the antitrust laws (Pet. App. 56a). Since, however, neither the parties nor the district court had addressed all the factual issues pertinent to the three-part exemption test, the court of appeals remanded for trial (Pet. App. 55a).

2. The proper scope of the labor exemption from the antitrust laws has been a vexing issue for decades. In this case the court of appeals formulated a new test for the labor exemption where the challenged anticompetitive conduct has previously been found to violate the labor laws. All parties contend that the court committed significant error in shaping this exemption.[1] Although these arguments are not without force, they are premature, for the decision is interlocutory and remands the case for trial. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). The contours of the court of appeals' antitrust

[1]Petitioners ILA and NYSA also contend that the court erred in treating their agreement as a boycott illegal per se under Section 1 of the Sherman Act (No. 78-1905 Pet. 17-19).

exemption test can best be determined upon review of a full trial record which demonstrates its practical application. See *Kleppe* v. *New Mexico*, 426 U.S. 529, 546 (1976).

Developments subsequent to the court of appeals' decision make current review particularly inadvisable. The predicate of the decision is the Board's 1975 determination that the Rules and their implementation constituted an unfair labor practice (Pet. App. 8a-11a, 15a-22a, 34a-35a, 55a, 57a). Recently, however, another court of appeals has held that the Board, acting on a complaint involving the same container Rules, incorrectly concluded that the Rules violate federal labor law. *International Longshoremen's Association* v. *NLRB*, Nos. 77-1735, 77-1758, 78-1510 (D.C. Cir. Sept. 25, 1979), petition for rehearing en banc filed October 19, 1979.[2] The eventual outcome of that case could fundamentally affect the present litigation. If the decision of the District of Columbia Circuit is not reversed by the court sitting en banc or by this Court on subsequent review, it could have a direct bearing on the application of the labor exemption standard fashioned by the Third Circuit, either at the trial level or on further review in the court of appeals. In any event, until the validity of the Board's interpretation of Sections 8(e) and 8(b)(4) is settled, this Court should not review the implications of that interpretation under the antitrust laws.

[2]The decision is reproduced as an addendum to the Supplemental Brief For Petitioners in Nos. 78-1902 and 78-1905.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NORTON J. COME
Acting General Counsel
National Labor Relations Board

NOVEMBER 1979

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see

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